

**BEFORE THE INSURANCE COMMISSIONER**  
**OF THE STATE OF CALIFORNIA**

In the Matter of the Requests for Compensation of	) FILE NO. RFC-2024-004
	)
<b>CONSUMER WATCHDOG,</b>	) <b>DECISION AWARDING</b>
	) <b>COMPENSATION</b>
Intervenor.	)
	) <i>In the Matter of the Rate Application</i>
	) <i>of State Farm General Insurance</i>
	) <i>Company</i>
	)
	) Rate Application Nos. 23-613
	) Prior Approval File No. PA-2023-00007
-----)	)

**INTRODUCTION**

California law requires that the rates used for calculating premiums on certain classes of insurance be approved by the Insurance Commissioner before they are put into use.<sup>1</sup> In the parlance of the insurance industry and government regulators, this is colloquially known as *prior approval rate regulation*.<sup>2</sup> Independent parties representing the interests of consumers may intervene and participate in the rate approval process, separate and apart from the Rate Enforcement Bureau, the regulatory unit established in the Department of Insurance (Department) by the Commissioner that is responsible for prior approval compliance.<sup>3</sup>

In the matter presented here, Consumer Watchdog intervened in State Farm General

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<sup>1</sup> Ins. Code, § 1861.01, subd. (c); Cal. Code Regs., tit. 10, § 2644.1; *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1259.

<sup>2</sup> Ins. Code, § 1861.05, subd. (a); *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 243, *as modified on denial of reh'g* (Sept. 29, 1994).

<sup>3</sup> Ins. Code, § 1861.10, subd. (a).

Insurance Company (State Farm) Rate Change Application<sup>4</sup> (Application), which sought an overall 28.1% rate increase to its California Homeowners Program line. Consumer Watchdog now makes a Request for an Award of Compensation (RFC) based on their intervention.<sup>5</sup> In the RFC, Consumer Watchdog requests advocacy and witness fees totaling \$175,895.15.<sup>6</sup> Consumer Watchdog urges the Chief Administrative Law Judge (CALJ or Chief Judge) to grant the fees and expenditures in full, contending that such an award is proper because Consumer Watchdog met or exceeded all procedural and substantive prerequisites necessary for receiving such relief.<sup>7</sup>

After reviewing the RFC's moving and supporting papers, the Chief Judge was alerted to the Department's use of prior rate approval procedures that are neither codified by insurance law, nor found in the regulations, but which the Department utilizes in lieu of those that are contemplated. The failure to follow proscribed statutory and regulatory procedures raises many serious questions, including whether the Application properly concluded in the instant matter, thereby triggering the RFC filing window as Consumer Watchdog pleads. As a threshold issue addressed *infra*, the Chief Judge therefore initially examines this dilemma and determines that while the ultimate implications of such irregularities remain undecided, the RFC is nevertheless redressable now.

Consumer Watchdog's fees and expenditures are permissible because Consumer Watchdog made a substantial contribution by raising ten distinct issues with State Farm's Application, propounding information requests, preparing an actuarial analysis and rate template, contributing to the overall rate negotiations.<sup>8</sup> This resulted in more relevant, credible, and non-frivolous information being available to the Commissioner in making the decision approving the

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<sup>4</sup> Rate Application No. 23-613.

<sup>5</sup> Ins. Code, § 1861.10, subd. (b); Cal. Code Regs., tit. 10, § 2662.3, subd. (a).

<sup>6</sup> Consumer Watchdog Request for Compensation (RFC), pp. 2, 24.

<sup>7</sup> Ins. Code, § 1861.10, subd. (b); Cal. Code Regs., tit. 10, §§ 2662.5, 2662.3, subds. (a),(b).

<sup>8</sup> RFC at pp. 4-6.

Application. Accordingly, as is consistent with this decision, an award of \$175,895.15, is appropriate.

The RFC is GRANTED.

### ***PROCEDURAL AND FACTUAL BACKGROUND***

#### **I. Prior Approval History and Purpose**

In November 1988, California voters passed the Insurance Rate Reduction and Reform Act, better known as Proposition 103. Proposition 103 fundamentally changed insurance regulation in California. Prior to Proposition 103's passage, California was an "open rate" jurisdiction, under which insurance carriers set rates without the Insurance Commissioner's (Commissioner) prior or subsequent approval.<sup>9</sup> Proposition 103 altered this system in order "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."<sup>10</sup> To that end, Proposition 103 added Insurance Code article 10, which provides the Commissioner with broad authority over insurance rates, guarantees public rate hearings and expressly precludes the Commissioner from approving rates that are "excessive, inadequate, unfairly discriminatory or otherwise in violation" of the Insurance Code.<sup>11</sup>

Proposition 103's other central objective was to "enable consumers to permanently unite to fight against insurance abuse" by promoting consumer participation in the rate review process.<sup>12</sup> Accordingly, it encouraged consumer groups to "initiate or intervene in any

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<sup>9</sup> *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 812; *20<sup>th</sup> Century Ins. Co. v. Garamendi* (1984) 8 Cal.4<sup>th</sup> 216, 240.

<sup>10</sup> *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4<sup>th</sup> 1029, 1041; *Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4<sup>th</sup> 842, 853.

<sup>11</sup> Ins. Code, § 1861.05, subds. (a) and (c).

<sup>12</sup> *State Farm Mutual Automobile Ins. Co. v. Garamendi*, 32 Cal 4<sup>th</sup> at p. 1045.

proceeding permitted or established pursuant this chapter, challenge any action of the commissioner under this article, and enforce any provision of this article.”<sup>13</sup> To further that participation, the initiative provided consumer groups with advocacy fees for any work that substantially contributed to the Commissioner’s decision on a rate application.<sup>14</sup>

It is against this backdrop that the following proceeding was undertaken.

## **II. Rate Application & Intervention**

On February 28, 2023, State Farm filed Application No. 23-613 with the Department.<sup>15</sup> The Application sought a 28.1% rate increase to State Farm’s Homeowners Program line.<sup>16</sup> On March 17, 2023, the Department notified the public of State Farm’s Application, as required by statute.<sup>17</sup>

After the Application was publicly noticed, Consumer Watchdog’s outside actuarial expert Allan I. Schwartz reviewed the Application and determined the proposed rate change was excessive and/or unfairly discriminatory in violation of Insurance Code section 1861.10, subdivision (a).<sup>18</sup>

On May 1, 2023, Consumer Watchdog filed a Petition for Hearing, Petition to Intervene, and Notice of Intent to Seek Compensation (Petition) regarding State Farm’s Application.<sup>19</sup> The Petition raised a number of issues. Specifically, Consumer Watchdog noted that State Farm’s net income in 2021 of \$436 million, which was more than 20% of premium, was not consistent with the large rate increase being proposed, but instead would be consistent with a rate decrease.<sup>20</sup>

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<sup>13</sup> Ins. Code, § 1861.10, subd. (a).

<sup>14</sup> Ins. Code, § 1861.10, subd. (b).

<sup>15</sup> Consumer Watchdog’s Request for Compensation (RFC), 3:20-21.

<sup>16</sup> RFC, 4:1-4; see also, Declaration of Pamela Pressley in Support of Consumer Watchdog’s Request for Compensation (Pressley Decl.) at ¶ 32.

<sup>17</sup> Pressley Decl. at ¶ 32.

<sup>18</sup> Pressley Decl. at ¶ 33.

<sup>19</sup> Pressley Decl. at ¶ 34; Exh. 4.

<sup>20</sup> Pressley Decl. at ¶ 35; Petition for Hearing at ¶ 8a.

Consumer Watchdog also noted State Farm did not justify the use of amount of insurance (“AOI”) as the proper base for the catastrophe adjustment; selected annual loss trends were among the highest of the possible values; used incurred loss development in the rate templates; had not shown that all of its institutional advertising expenses had been reflected in the excluded expense provision; and had proposed use of \$0 for California Finance / Service Charges in 2021 for projecting the future value appeared to be unreasonable and actuarially unsound.<sup>21</sup>

Additionally, the intervenor claimed State Farm had not shown that its average premiums were significantly larger or smaller than the average California premiums for purposes of seeking a variance under 10 CCR § 2644.27(f)(2)(C); failed to prove that its selected loss development and trend selections were the most actuarially sound; and had not adequately supported other items in the filing, including but not limited to, to the values and procedures used for: (i) Location Rating, (ii) Wildfire Mitigation Discount – Community Level, and (iii) Wildfire Mitigation Discount – Property Level.<sup>22</sup>

On May 15, 2023, the Commissioner granted Consumer Watchdog’s Petition to Intervene, finding that Consumer Watchdog “has raised and seeks to address issues that are relevant to the ratemaking process”.<sup>23</sup> Although Application No. 23-613 sought a proposed rate increase of 28.1%, the Commissioner did not grant Consumer Watchdog’s Petition for Hearing and did not issue a Notice of Hearing, despite the statutory mandate to do so under Insurance Code section 1861.05 subdivision (c)(3).

On May 18, 2023, State Farm submitted its response to the issues Consumer Watchdog raised in its Petition. Specifically, State Farm stated that Consumer Watchdog’s allegation

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<sup>21</sup> Pressley Decl. at ¶¶ 37-40; Petition for Hearing at ¶¶ 8c through 8f.

<sup>22</sup> Pressley Decl. at ¶¶ 41-44; Petition for Hearing at ¶¶ 8h through 8j.

<sup>23</sup> Ruling Granting Consumer Watchdog’s Petition to Intervene, dated May 15, 2023, p. 4; Pressley Decl. at ¶ 45; Exh. 5.

regarding its 2021 net income was factually incorrect and inconsistent with the information reported on its 2021 Annual Statement; defended its use of AOI and Fire Following Earthquake; argued that the text of 10 CCR § 2644.7 did not require an insurer to use the most actuarially sound trend selections; defended its use of incurred loss development; claimed that it had provided the information required by the rate application to establish the excluded expense factor; stated that it no longer charged installment fees and would not in the future, supporting its projection of future values; justified its application of Variance 2C; and stated that its Variances 7D and 8F had virtually no impact.<sup>24</sup>

On May 22, 2023, Consumer Watchdog submitted 18 Requests for Information to Applicant. In part, Consumer Watchdog requested a detailed explanation on the indicated rate need; the rationale for the proposed rate changes as those related to the Applicant's calculated indicated need; a discussion of the general type of risk profiles that would receive the larger and smaller premium changes as a result of the filing; other actions being taken by the company to address overall profitability and growth plans; and an explanation for any material increase/decrease in the in-force policy count/exposures over the past several years.<sup>25</sup> Consumer Watchdog also requested information regarding the overall company strategy with writing business in California; the 2019 to 2022 Annual Statements; the 2019 to 2022 Consolidated Annual Statements; the 2023Q1 Financial Statement; any agreements and payments between State Farm and affiliated companies from 2019 to 2022; data, documents, correspondence, analyses, and exhibits that State Farm provided in response to CDI requests related to COVID; and explanation for why Applicant allegedly included factually incorrect information in its rate application and why the rate application was inconsistent with the Annual Statement; and

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<sup>24</sup> Pressley Decl. at ¶ 46; Exh. 6.

<sup>25</sup> RFC, Exh. B; Pressley Decl. at ¶ 47.

documentation regarding any instances when Variance 2C had been allowed for renters and condo unit owner policies.<sup>26</sup>

On June 6, 2023, Consumer Watchdog submitted 12 more Requests for Information to Applicant. Specifically, Consumer Watchdog requested the statewide industrywide average premium for renters and condo policies; the derivation of the requested variance of 8.8 percentage points higher than the efficiency standard established under 10 CCR § 2644.12 for Renters and variance of 4.2 percentage points higher than the efficiency standard for Condominium Unit owners; explanation of State Farm's taking into account 10 CCR § 2644.27(h) in deriving the 8.8 and 4.2 percentage points; State Farm's opinion on whether NAIC's average California premiums for HO-4 and HO-6 in its report "Dwelling Fire, Homeowners Owner-Occupied, and Homeowners Tenant and Condominium/Cooperative Unit Owners Insurance: Data for 2020" were accurate and reliable values; whether State Farm contended that the values in the NAIC report were significantly smaller or larger than the values shown in the Application; all analyses performed by State Farm regarding the cost impact of refusing to write new homeowners' insurance in California; the 2023Q1 Financial Statement; all reserve analyses subsequent to the 12/31/2022 analysis dealing with the lines of insurance included in the Application; and description of any changes in operations that had been implemented from 2019 to the present, as well as any such changes anticipated to be implemented over the next two years.<sup>27</sup>

On June 30, 2023, State Farm responded to Consumer Watchdog's May 22 requests. State Farm stated, in part, that its indicated rate need was driven by a previous approved change that was lower than its indicated rate change, as well as increases in inflation and construction

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<sup>26</sup> *Ibid.*

<sup>27</sup> RFC Exh. C; Pressley Decl. at ¶ 48.

costs; its proposed rate change equaled its indicated rate need for Non-Tenants and moved significantly toward the indication for Renters and Condominium Unitowners; the primary driver for larger or smaller premium changes was location rating factor changes; it had ceased accepting new applications for homeowners, personal lines, and business insurance products effective May 27, 2023 in an effort to address overall profitability and growth plans; and policy growth in the Homeowners line had been higher than anticipated due to changing market conditions and State Farm's overall objective was to maintain financial strength for existing customers.<sup>28</sup>

On July 3, 2023, State Farm produced the Actuarial Opinions, the Combined Statements, the Annual Statements, and the Management's Discussion and Analysis from 2019-2022, and its Insurance Expense Exhibits for the years 2019 and 2020 and the Quarterly Statement for 2023Q1.<sup>29</sup> On July 7, 2023, State Farm filed a Note to Reviewer in SERF containing documents entitled "Additional Actuarial Selection Support" and "Variance 2C Support" in response to Consumer Watchdog's June 6 request.<sup>30</sup>

On July 14, 2023, State Farm responded to Consumer Watchdog's June 6 Requests for Information. Specifically, State Farm referred Consumer Watchdog to its July 7 Note to Reviewer; stated that there was no cost impact from its refusal to write new homeowners insurance in California; stated that it had not experienced any material shifts in its mix of business that would necessitate a data adjustment to catastrophe; and stated that from 2019 to present, filed underwriting guidelines had been in place to help manage exposure within the Homeowners program and that State Farm would continue to evaluate its approach based on

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<sup>28</sup> RFC Exh. D; Pressley Decl. at ¶ 49.

<sup>29</sup> RFC Exh. E; Pressley Decl. at ¶ 50.

<sup>30</sup> RFC Exh. F; Pressley Decl. at ¶ 51



changing market conditions.<sup>31</sup>

On July 28, 2023, Consumer Watchdog submitted follow-up questions to State Farm's responses, and four additional Request for Information. Consumer Watchdog requested any additional documentation supporting State Farm's explanation of the main drivers of its indicated rate need, as previously requested; identification of the underwriting guideline changes that State Farm enacted to address overall profitability and growth plans in California; Insurance Expense Exhibits for 2021–2022; all analyses performed by State Farm, in making the decision to no longer write new business applications across the state; and the complete output reports from the FFEQ model runs, including but not limited to the size of loss distribution along with the probability associated with each event. The intervenor also requested all documents and calculations underlying each of the values shown in the July 7 Note to Reviewer document titled "Variance 2C Support"; and a completed version of the Wildfire Risk Scores—Rating and Eligibility section on page 5 of the HO Questionnaire.<sup>32</sup>

On August 2, 2023, State Farm provided the Insurance Expense Exhibits for 2021–2022, and on August 8, 2023, State Farm filed a Note to Reviewer via SERFF with a document entitled "Updated Variance 2C Support."<sup>33</sup>

On August 9, 2023, State Farm responded to Consumer Watchdog's July 28, 2023 follow-up requests by indicating it would not provide detailed information about the main drivers of the indicated rate need and would not provide any analysis beyond that previously submitted in the rate filing in response to Consumer Watchdog's requests. State Farm also refused to provide the requested output reports from the FFEQ model runs, citing confidentiality grounds, but provided the raw numbers used to populate the tables provided in Exhibit 13, Page 15; and

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<sup>31</sup> RFC Exh. G; Pressley Decl. at ¶ 52.

<sup>32</sup> RFC Exh. H; Pressley Decl. at ¶ 53.

<sup>33</sup> RFC Exhs. I, J; Pressley Decl. at ¶¶ 54, 55.

referred Consumer Watchdog to the August 8 Note to Reviewer for updated Variance 2C Support, as well as providing additional detail.<sup>34</sup>

On August 29, 2023, Consumer Watchdog requested further information regarding State Farm's wildfire mitigation discounts. Consumer Watchdog asked whether all customers could conceivably get the full discount for hardening their homes and requested information regarding the IBHS Wildfire Prepared Home Plus designation and required inspection and costs to the customer.<sup>35</sup>

On September 6, 2023, Consumer Watchdog requested State Farm's most recent ORSA report, which Consumer Watchdog asserted would be relevant to issues including catastrophe and trend. On September 8, 2023, State Farm stated it would not produce the ORSA report, citing confidentiality concerns.<sup>36</sup>

On September 12, 2023, Consumer Watchdog sent an email to the Parties noting that while it would agree to a date for a three-way call, there were still five outstanding requests for information and documents that State Farm had not yet produced, including (1) the actuarial reserve report underlying the 12/31/2022 Statement of Actuarial Opinion, (2) reserve analyses subsequent to the 12/31/2022 analysis dealing with the lines of insurance included in the application, (3) any internal analyses performed showing the underwriting results for the lines of insurance covered by the application during the last three years, (4) the complete output reports from the FFEQ model runs, and (5) the aforementioned ORSA Report. Consumer Watchdog requested that State Farm reconsider its positions on these items as it would likely be required to produce this information if the matter proceeded to a hearing.<sup>37</sup>

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<sup>34</sup> RFC at Exh. K.

<sup>35</sup> RFC Exh. L; Pressley Decl. at ¶ 57.

<sup>36</sup> Pressley Decl. at ¶¶ 59, 60.

<sup>37</sup> *Id.* at ¶ 61.

On September 14, 2023, Consumer Watchdog provided further explanations of the relevance of each of these outstanding document requests to issues raised by Consumer Watchdog. On September 20, 2023, the Department requested that State Farm remove its wildfire discounts from this rate filing and file them in a separate rule filing.<sup>38</sup>

On September 27, 2023, Consumer Watchdog submitted its written analysis and rate indications by policy form to the Department and State Farm, indicating a maximum overall rate increase of 10.6%.<sup>39</sup>

On September 28, 2023, the Department transmitted a three-way comparison chart of the Parties' indications. The Department's chart showed the differences between each of the Parties in their selections on the various rate components.<sup>40</sup>

On October 4, 2023, Consumer Watchdog participated in a three-way teleconference with the Parties during which Consumer Watchdog's actuary answered questions regarding his actuarial analysis. Further, Consumer Watchdog made clear that its indicated 10.6% rate increase was contingent on State Farm's resuming of writing new business in California.<sup>41</sup>

On October 6, 2023, State Farm provided additional information in response to requests made by Consumer Watchdog on the three-way call. State Farm refused to provide the requested FFEQ Model Output reports, again citing confidentiality concerns, and instead offered data reflecting 1 in 1000-year Probable Maximum Loss (PML) model output as alternative support for the FFEQ provisions used in the filing. Regarding the requested actuarial reserve report, State Farm reported that it would consult with its legal department to determine whether any additional

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<sup>38</sup> RFC Exh. N, O; Pressley Decl. at ¶ 62, 63.

<sup>39</sup> RFC Exh. P. Pressley Decl. at ¶ 64.

<sup>40</sup> RFC Exh. Q; Pressley Decl. at ¶ 65.

<sup>41</sup> Pressley Decl. at ¶ 66.

information regarding the report could be released.<sup>42</sup>

On October 9, 2023, Consumer Watchdog sent an email to the Parties responding to a number of issues raised by State Farm both in the October 4 call and October 6 email. Regarding the FFEQ model output, Consumer Watchdog insisted that the substitute information provided in State Farm's October 6 email was insufficient. Additionally, Consumer Watchdog again reiterated that its 10.6% indication was based on State Farm's continuing to write new business. Finally, Consumer Watchdog requested additional information about how State Farm planned to accomplish providing refunds to its policyholders by December 2023 for the intervenor fees it passed through without prior approval in its policyholders' bills from the fee award against it in the *State Farm v. Lara* writ matter.<sup>43</sup>

On October 11, 2023, counsel for State Farm responded, asserting (1) Consumer Watchdog did not sufficiently state why the substitute information regarding the FFEQ model output was insufficient, (2) Consumer Watchdog did not in fact need to review the Actuarial Reserve Report, pointing to what it believed was sufficient information from other sources, (3) that the pass-through issue noted above was not relevant and would not provide that information, (4) that there is no level of rate increase that would result in State Farm's resuming the writing of new business in California, and (5) that State Farm's request for Variance 2(C) was in fact supportable.<sup>44</sup>

On October 19, 2023, counsel for State Farm emailed the Parties declining to produce anything further on the question of the FFEQ model output.<sup>45</sup>

On October 20, 2023, Consumer Watchdog sent an email to the Parties disagreeing with

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<sup>42</sup> RFC Exh. R/

<sup>43</sup> RFC Exh. S; Pressley Decl. at ¶ 68.

<sup>44</sup> RFC Exh. T; Pressley Decl. at ¶ 69.

<sup>45</sup> Pressley Decl. at ¶ 71.

State Farm and CDI that the pass-through of intervenor fees issue is not relevant to the rate proceeding, given that in doing so, State Farm overcharged its customers in excess of its approved rates in violation of section 1861.05(a). Additionally, Consumer Watchdog offered to settle the matter by stipulating to a 9.59% rate increase absent further information provided by State Farm, considering State Farm's blanket refusal to resume writing new business.<sup>46</sup>

On November 8, 2023, the Parties had a further three-way call to discuss the Parties' positions, State Farm's financial condition, and outstanding document requests. On November 13, 2023, counsel for State Farm sent an email to the Parties, again refusing to provide the Actuarial Reserve Report based on confidentiality grounds.<sup>47</sup>

During November and December 2023, the State Farm and Consumer Watchdog continued to disagree about the confidentiality of some information. Consumer Watchdog proposed to enter into a one-time, limited confidentiality agreement under which Consumer Watchdog attorneys and actuary would be permitted to review the Actuarial Reserve Report to verify State Farm's claims. State Farm refused.<sup>48</sup>

In response, on December 18, 2023, Consumer Watchdog stated that it was willing to stipulate to a 20% rate increase to resolve the filing (not interim rate) in exchange for State Farm agreeing to provide the actuarial reserve report subject to a Non-Disclosure Agreement ("NDA") to confirm State Farm's statements. Consumer Watchdog also sought State Farm's agreement to a six-month moratorium on the effective date of any new Homeowners' rate filing from the effective date of the rates approved under the current application.<sup>49</sup>

On December 22, 2023, the Parties signed a joint Settlement Stipulation (Settlement)

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<sup>46</sup> Presley Decl. at ¶ 72.

<sup>47</sup> Presley Decl. at ¶¶ 73, 74.

<sup>48</sup> Pressley Decl. at ¶¶ 79, 80.

<sup>49</sup> Pressley Decl. at ¶ 81.

agreeing to an overall rate increase of 20.0% to State Farm's California Homeowners Program line of insurance (by coverage: 20.8% for non-tenant homeowners, 0.0% for renters, and 20.0% for condominium unit-owners) with an effective date of March 15, 2024.<sup>50</sup> The settlement also called for the filing of an amended Application and for the withdrawal of Consumer Watchdog's Petition for Hearing.<sup>51</sup> The Parties further agreed that in the event that State Farm submits a new rate increase application for its homeowners line, it agrees that the effective date for such application will be no earlier than September 15, 2024, except that State Farm may file for an earlier effective date if requested by a state regulator with authority to regulate Applicant's financial condition. Applicant further agreed that within a reasonable time it would confidentially provide Petitioner with a copy of its 2023 Actuarial Reserve Report ("Report") pursuant to a nondisclosure agreement agreed-upon among Applicant, Petitioner, and PwC (Applicant's auditor and creator of the Report). The settlement did not contain information on the carrier's premium, nor did it contain a finding that the rate approved was not excessive or discriminatory. The settlement was not submitted to an administrative law judge for a proposed decision on its fundamental fairness, pursuant to California Code of Regulations, title 10, section 2656.1.

On December 22, 2023, the Commissioner approved the amended Application via the Department's electronic filing system, reflecting a 20% rate increase.<sup>52</sup> On that same date, Consumer Watchdog withdrew its Petition for Hearing.<sup>53</sup>

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<sup>50</sup> Pressley Decl. at ¶ 82

<sup>51</sup> *Ibid.*

<sup>52</sup> Pressley Decl. at ¶ 82; Exh. 7.

<sup>53</sup> Pressley Decl. at ¶ 84.

### III. Request for Compensation

On January 29, 2024, Consumer Watchdog filed a Request for Compensation (RFC) with the Commissioner, pursuant to Insurance Code section 1861.10, subdivision (b), seeking advocate fees for work performed by Consumer Watchdog employees Harvey Rosenfield, Pamela Pressley, Benjamin Powell, Ryan Mellino, Ben Armstrong and Kaitlyn Gentile, and expert witness fees for Mr. Schwartz and Kathleen Tollar.<sup>54</sup>

Mr. Rosenfield is an attorney with over 40 years of experience in insurance regulatory and litigation matters, counsel to and founder of Consumer Watchdog, and the author and proponent of Proposition 103. Ms. Pressley is an attorney with over 26 years of consumer advocacy experience, and Mr. Powell is an attorney with seven years of experience, who began his career as a law clerk at Consumer Watchdog.<sup>55</sup> Mr. Mellino is a staff attorney for Consumer Watchdog providing litigation support spanning across Consumer Watchdog's issue areas, including insurance, civil rights, and healthcare litigation. Mr. Mellino passed the bar in 2022.<sup>56</sup> Ben Armstrong, FAAS, MAAA is a staff actuary at Consumer Watchdog. In this capacity, Mr. Armstrong performs independent analysis of insurers rate filings, including assessments of their accuracy and actuarial soundness. Mr. Armstrong is a Fellow of the Casualty Actuarial Society and a Member of the American Academy of Actuaries.<sup>57</sup> Ms. Gentile is a paralegal with over 14 years of litigation experience.<sup>58</sup>

The Request for Compensation seeks compensation for 41.4 hours of Mr. Rosenfield's time at the rate of \$695 per hour, 79.1 hours of Ms. Pressley's time at the rate of \$595 per hour, 52.4 hours of Mr. Powell's time at the rate of \$350 per hour, 8.3 hours of Mr. Mellino's time at

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<sup>54</sup> Consumer Watchdog requested, and received, an extension of time to file its RFC.

<sup>55</sup> *Id.* at ¶¶ 9, 13, 16

<sup>56</sup> *Id.* at ¶ 20.

<sup>57</sup> *Id.* at ¶ 26.

<sup>58</sup> *Id.* at ¶ 22.

\$250 per hour, 21.1 hours of Mr. Armstrong's time at \$425 per hour, and 8.9 hours of Ms. Gentile's time at the rate of \$200 per hour, for a total of \$107,000.00.<sup>59</sup> Mr. Schwartz has over 40 years of actuarial experience, and is the President of AIS Risk Consultants, Inc. Mr. Schwartz previously served as Assistant Commissioner of the New Jersey Department of Insurance, and chief actuary of the North Carolina Department of Insurance.<sup>60</sup> The Request for Compensation seeks compensation for 69.5 hours of Mr. Schwartz's time at \$955 an hour, and 5.8 hours for Mr. Schwartz's associate Katherine Tollar at \$430 an hour, for a total of \$68,895.15.<sup>61</sup>

Consumer Watchdog supported the Request for Compensation with a declaration by Ms. Pressley and Richard M. Pearl, Esq, an expert in court-awarded attorneys' fees.<sup>62</sup> The hours billed are limited to time spent on State Farm's Application, including preparation of the Request for Compensation.<sup>63</sup>

Consumer Watchdog also provided a declaration by Mr. Schwartz in support of his expert witness fees. Mr. Schwartz's declaration speaks to the reasonableness of his expert witness fees. Mr. Schwartz notes that market rates for actuarial consulting services are not readily available.<sup>64</sup> According to the Casualty Actuarial Society, the number of consulting actuaries with locations in San Francisco and Los Angeles are 19 and 14, respectively.<sup>65</sup> In addition, consulting actuaries generally consider their rates to be proprietary information, except when disclosed in court proceedings or government contracts.<sup>66</sup> Mr. Schwartz's declaration provides his rates in earlier prior approval cases and compares them with those rates charged by actuaries hired by the

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<sup>59</sup> *Id.* at ¶ 20.

<sup>60</sup> *Id.* at ¶ 22. See also, Declaration of Allan Schwartz at p. 1.

<sup>61</sup> RFC Exh. A.

<sup>62</sup> *Id.* at Exh. 2.

<sup>63</sup> *Id.* at Exh. 1a.

<sup>64</sup> Schwartz Decl. para. 3.

<sup>65</sup> *Id.* at ¶ 14.

<sup>66</sup> *Id.* at ¶ 13.



insurers.<sup>67</sup> Mr. Schwartz also indicates the rates charged in this proceeding are consistent with those he charged to other entities and jurisdictions during the same time frame.<sup>68</sup>

In response to the RFC, State Farm filed a declaration from its counsel, Vanessa Wells. Ms. Wells states that in her experience, “clients do not pay for work by timekeepers who have not been identified, they do not pay for two timekeepers to do the same work, and they do not pay for training.”<sup>69</sup> It appears Ms. Wells alleges Consumer Watchdog’s use of two actuaries, Mr. Armstrong and Mr. Schwartz, somehow runs afoul of the Regulations. Ms. Wells provides no support for this contention, and her argument about the reasonableness of Consumer Watchdog’s fees is prejudiced by State Farm’s failure to provide an accounting of its own fees in this proceeding.<sup>70</sup>

### **III. Post-RFC Briefing**

On March 24, 2024, the Administrative Hearing Bureau issued an Order for Additional Briefing, requesting all parties address the following questions: (1) whether the parties complied with California Code of Regulations, title 10, section 2656.1 in settling this rate proceeding; or in the alternative, justifying its non-compliance therewith; and (2) whether the Request for Compensation is timely filed.<sup>71</sup>

On April 29, 2024, the parties filed briefs addressing Regulations section 2656.1 and the timeliness of Consumer Watchdog’s RFC. The Department contends Regulation section 2651.1, subdivision (h)’s “the plain language” demonstrates it does not apply to Regulations section 2656.1 regarding proposed settlements.<sup>72</sup> The Department further asserts that to the extent that

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<sup>67</sup> *Id.* at ¶ 6; Exh 1, thereto.

<sup>68</sup> *Id.* at ¶¶ 4 and 5.

<sup>69</sup> Declaration of Vanessa Wells, dated February 29, 2023, ¶ 3.

<sup>70</sup> Cal. Code Regs., tit. 10, § 2662.3, subd. (g).

<sup>71</sup> AHB Order at p. 3.

<sup>72</sup> Department of Insurance Brief at 4:13-5:16.

section 2651.1, subdivision (h)'s language is ambiguous, the Chief Judge should look to the Department's Statement of Reasons, filed with the Office of Administrative Law when it amended the regulations.<sup>73</sup> Lastly, the Department argues that applying Regulations section 2656.1 to rate proceedings where a Notice of Hearing has not issued "would be contrary to public policy behind the regulations."<sup>74</sup>

Consumer Watchdog argues the parties resolved the rate proceeding according to CDI's long-standing, informal practice, and that the matter could not be sent to an Administrative Law Judge because there was "no ALJ assigned to the proceeding to whom the Parties could submit a proposed stipulation"<sup>75</sup> Consumer Watchdog also notes that the rate application's approved rate increases have already been implemented and that AHB lacks the authority to rescind the implementation.<sup>76</sup>

State Farm's brief echoes Consumer Watchdog in outlining what the carrier calls the Department's "inclusive review." As described by State Farm, "the intervenors are permitted to participate in CDI's review of rate applications, with the design that any concerns can be resolved during that process and resolved without the need for a hearing."<sup>77</sup> State Farm also argues the settlement regulation must be construed in accordance with the Commissioner's course of conduct in handling such matters, stating "the Commissioner never noticed a hearing, never **had** to notice a hearing, and an ALJ, therefore, never had a role to play in the approvals."<sup>78</sup>

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<sup>73</sup> *Id.* at pp. 5-11.

<sup>74</sup> *Id.* at pp. 11-15.

<sup>75</sup> Consumer Watchdog Brief at pp. 2-3.

<sup>76</sup> *Id.* at pp. 3-4.

<sup>77</sup> State Farm Brief at 6:11-14.

<sup>78</sup> *Id.* at 7:11-13.

## *APPLICABLE LAW*

### **I. Prior Approval Statutory & Regulatory Requirements**

As discussed above, Proposition 103 amended the Insurance Code to provide for prior approval of insurance rates and robust consumer participation in the rate review process. But because Proposition 103 did not establish a detailed method of processing and deciding rate applications, the Department of Insurance used its broad authority to promulgate regulations to further Proposition 103's fundamental objectives.<sup>79</sup> Accordingly, the rate review procedure under California's prior approval model is now comprised of the initiative's statutory amendments to the Insurance Code, and the regulations adopted by the Department in accordance with the Administrative Procedure Act.<sup>80</sup>

#### **A. Rate Application Filing and Public Notice**

Pursuant to Insurance Code section 1861.05, subdivision (b), rate review begins when an insurance carrier files a complete rate application with the Commissioner.<sup>81</sup> A complete application includes data outlined in Insurance Code section 1857.7, such as premium written and earned, claims paid, net loss reserves, investment income, and other expenses.<sup>82</sup> Once the Commissioner receives a rate application, the Department has 14 days to review the rate application for completeness.<sup>83</sup> For applications deemed complete, the Commissioner has 10 days to provide public notice of the rate application.<sup>84</sup> All information provided to the Commissioner in the rate application shall be available for public inspection, including trade secret information.<sup>85</sup> The Commissioner then has 60 days from the date of public notice to

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<sup>79</sup> *State Farm Mutual Automobile Ins. Co. v. Garamendi*, 32 Cal.4<sup>th</sup> at p. 1040.

<sup>80</sup> See, Govt. Code, § 11342.2.

<sup>81</sup> See also, Cal. Code Regs., tit. 10, § 2648.2, subd. (a).

<sup>82</sup> Ins. Code, § 1861.05, subd. (b).

<sup>83</sup> Cal. Code Regs., tit. 10, § 2648.2, subd. (b).

<sup>84</sup> Ins. Code, § 1861.05, subd. (c); Cal. Code Regs., tit. 10, § 2648.2, subd. (f).

<sup>85</sup> Ins. Code, § 1861.07.

review the application and determine whether to initiate a formal hearing on “his or her own motion.”<sup>86</sup>

**B. Consumer Petition for Hearing, Petition to Intervene & Departmental Response**

Following the Commissioner’s public notice, consumers have 45 days within which to petition the Commissioner for a public hearing on the rate application.<sup>87</sup> The Petition for Hearing is considered a “pleading” and must include an offer of the evidence the consumer would present or illicit at hearing.<sup>88</sup> Consumers serve the Petition for Hearing on the insurance carrier, and the Petition for Hearing’s filing commences a “proceeding” under the statute and its applicable regulations.<sup>89</sup>

A consumer group may also intervene in “any proceeding” by filing a Petition to Intervene with the Commissioner.<sup>90</sup> A consumer group filing a Petition to Intervene must meet the requirements of California Code of Regulations, title 10, section 2661.3 and demonstrate that it represents consumer interests.<sup>91</sup> In addition, the consumer group must request and secure a finding of eligibility from the Commissioner in order to seek compensation for their participation.<sup>92</sup> Thereafter, the consumer group is a “party” to the proceeding, and eligible to seek advocacy fees and expenses for work performed, as discussed, *infra*, below.<sup>93</sup>

In response to a Petition for Hearing, the Department’s Rate Enforcement Bureau has three days from submission to file a response with the Commissioner.<sup>94</sup> The insurance carrier is

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<sup>86</sup> Ins. Code, § 1861.05, subd. (c)(2).

<sup>87</sup> Ins. Code, § 1861.05, subd. (c)(1); Cal. Code Regs., tit. 10, § 2653.1.

<sup>88</sup> Cal. Code Regs., tit. 10, § 2653.1, subd. (a)(3).

<sup>89</sup> Ins. Code, § 2653.1, subd. (c); Cal. Code Regs., tit. 10, §§ 2651.1, 2661.1, subd. (h).

<sup>90</sup> Ins. Code, § 1861.10, subd. (a). The Petition to Intervene may also be combined with the Petition for Hearing. (Cal. Code Regs., tit. 10, § 2661.3, subd. (a)).

<sup>91</sup> Ins. Code, § 1861.10, subd. (b).

<sup>92</sup> Cal. Code Regs., tit. 10, § 2662.2.

<sup>93</sup> Cal. Code Regs., tit. 10, § 2651.1, subd. (f).

<sup>94</sup> Cal. Code Regs., tit. 10, § 2653.3.

permitted five days to submit its response to the Commissioner.<sup>95</sup> After considering the Petition for Hearing and responses, the Commissioner must either grant or deny the consumer group's Petition for Hearing.<sup>96</sup> However, if the "proposed rate adjustment exceeds 7% of the then applicable rate for personal lines or 15% for commercial lines," the Commissioner must hold a hearing upon a timely request.<sup>97</sup>

Notwithstanding the above, a rate application shall be "deemed" approved 180 days after the application's receipt, unless the Commissioner disapproves the application after a public hearing or extraordinary circumstance exist.<sup>98</sup> The statute defines "extraordinary circumstances" to include rate change application hearings commenced during the 180 period, rate change applications subject to judicial review, or rate hearings continued pursuant to Government Code section 11524.<sup>99</sup>

### **C. Procedural Rules for Rate Proceedings**

The Insurance Code and its applicable regulations also set forth practice rules and procedures governing proceedings pursuant to Article 10.<sup>100</sup> These regulations define terms, set forth requirements for the filing of Petitions for Hearing and the Commissioner's response thereto, outline the Administrative Law Judge's powers, guide the presentation of evidence during a public hearing, specify the parties' obligations regarding any negotiated resolution of the proceeding, and provide consumer intervention rules and the requirements for granting advocacy fees and expenses.

With regard to proposed stipulations and settlements in rate proceedings, Regulation

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<sup>95</sup> Cal. Code Regs., tit. 10, § 2653.4.

<sup>96</sup> Cal. Code Regs., tit. 10, § 2653.5.

<sup>97</sup> Ins. Code, § 1861.05, subd. (c)(3);

<sup>98</sup> Ins. Code, § 1861.05, subd. (c).

<sup>99</sup> Ins. Code, § 1861.05, subd. (d).

<sup>100</sup> See, Subchapter 4.9, Cal. Code Regs., tit. 10, § 2649.1 et. seq.

section 2656.1 provides:

(a) Parties may stipulate to the resolution of an issue of fact or the applicability of a provision of law material to a proceeding, or may agree to settlement on a mutually acceptable outcome to a proceeding, with or without resolving material issues.

(b) Notice of the stipulation and a copy of the stipulation shall be served on any intervenor at the time of filing. However, no party to a proceeding pending before the Commissioner shall compensate or agree to compensate an intervenor, and no intervenor shall receive or agree to receive compensation from any party in connection with a proceeding pending before the Commissioner, other than a compensation award approved by the Commissioner in accordance with Article 14 of Subchapter 4.9. No agreement concerning the merits of any matter pending before the Commissioner may be conditioned upon the payment of compensation to an intervenor.

(c) Stipulations and settlements shall be filed with the administrative law judge for proposed acceptance or rejection. When a stipulation or settlement is filed with the administrative law judge, it shall also be served on all parties. If a stipulation dispositive of the case or a settlement is proposed prior to the taking of any testimony, the parties supporting the stipulation or settlement shall file and serve supporting declarations indicating the reasons that the settlement or stipulation is fundamentally fair, adequate, reasonable and in the interests of justice. The administrative law judge shall reject any stipulation or settlement which includes an agreement regarding intervenor fees.

Any party objecting to a proposed settlement or stipulation may file a written objection and

request a hearing before the administrative law judge on the proposed settlement or stipulation.

When a hearing is requested, the administrative law judge shall hold a hearing on the objections

within ten business days of the filing.<sup>101</sup> If the ALJ adopts the terms of a stipulation or

settlement, those terms shall be included in any proposed decision provided to the Commissioner

by the judge.<sup>102</sup> In addition, the administrative law judge shall reject a proposed stipulation or

settlement whenever, in the administrative law judge's judgment, the stipulation or settlement is

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<sup>101</sup> Cal. Code Regs., tit. 10, § 2656.1, subd. (g).

<sup>102</sup> Cal. Code Regs., tit. 10, § 2656.3.

not in the public interest and is not, taken as a whole, fundamentally fair, adequate, and reasonable.<sup>103</sup> Upon rejection, the administrative law judge may propose acceptable alternative terms to the parties and allow the parties reasonable time to consider those terms.<sup>104</sup>

## **II. Statutory and Regulatory Rules Governing Compensation for Public Participation**

To promote enforcement and public participation, Insurance Code section 1861.10, subdivision (a) authorizes consumers and their representatives to initiate and intervene in rate proceedings to enforce Article 10's provisions. The Insurance Code and the intervenor regulations provide that an intervenor must be compensated for their participation if substantive and procedural requirements are met.<sup>105</sup>

### **A. Substantive Requirements**

Insurance Code section 1861.10, subdivision (b) provides that the Commissioner shall award reasonable advocacy and witness fees and expenses to persons demonstrating that (1) they "represent the interests of consumers," and (2) they have "made a substantial contribution to the adoption of any order, regulation, or decision by the commissioner[.]" The Regulations contain substantially identical requirements.<sup>106</sup>

An intervenor represents the interests of consumers if it "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."<sup>107</sup>

An intervenor makes a substantial contribution if the intervenor "substantially contributed, as a whole, to a decision, order, regulation, or other action of the Commissioner by

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<sup>103</sup> Cal. Code Regs., tit. 10, § 2656.3, subd. (e).

<sup>104</sup> Cal. Code Regs., tit. 10, § 2656.2.

<sup>105</sup> Cal. Code Regs., tit. 10, §§ 2662.1 to 2662.8.

<sup>106</sup> Cal. Code Regs., tit. 10, § 2662.5, subd. (a).

<sup>107</sup> Cal. Code Regs., tit. 10, § 2661.1, subd. (j).

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."<sup>108</sup> A substantial contribution may be demonstrated without regard to whether a petition for hearing is granted or denied.<sup>109</sup>

### **B. Procedural Requirements**

The Regulations set forth various procedural requirements for claiming intervenor compensation. The intervenor must obtain the Commissioner's approval of a petition to intervene, and intervenor must be found eligible to seek compensation by the Commissioner's Public Advisor.<sup>110</sup> In addition, the intervenor must submit a request for an award of compensation within 30 days after the Commissioner's decision or action in the proceeding for which intervention was sought, or within 30 days after conclusion of the entire proceeding.<sup>111</sup> The request for compensation must be verified and include detailed descriptions of the services and expenditures, legible time and billing records, and a description of the intervenor's substantial contribution.<sup>112</sup>

Any objection to the RFC by the insurance carrier must be filed within 15 days.<sup>113</sup>

### **C. Payment and Amount of Compensation Award**

Where an intervenor's advocacy occurs in response to an insurer's rate application, the insurer must pay the intervenor's reasonable advocacy fees, witness fees and expenses.<sup>114</sup> Time

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<sup>108</sup> Cal. Code Regs., tit. 10, § 2661.1, subd. (k).

<sup>109</sup> *Ibid.*

<sup>110</sup> Cal. Code Regs., tit. 10, § 2662.3.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> Cal. Code Regs., tit. 10 2662.3, subd. (e).

<sup>114</sup> Ins. Code, § 1861.10, subd. (b).



spent preparing the intervenor's request for compensation may be included in those amounts.<sup>115</sup>

The intervenor's advocacy and witness fees must not exceed "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."<sup>116</sup>

Where an intervenor meets the requirements for compensation, the Commissioner may award a reduced amount only in limited circumstances. Regulations section 2662.5(b) provides:

To the extent the substantial contribution claimed by a 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.

### ***DISCUSSION***

The Insurance Code and the Commissioner's regulations were promulgated to process and review rate applications, provide the approved statutory and regulatory framework upon which all rate applications shall be vetted. But facts provided above demonstrate the parties are not adhering to the statutory and regulatory mandates to conduct public hearings, nor are the parties submitting proposed stipulations and settlements for review to the Administrative Law Judge. Instead, the parties are engaging in a long-standing, extra-regulatory process that permits rates to be implemented without a public hearing and without a determination that the

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<sup>115</sup> Cal. Code Regs., tit. 10, § 2661.1, subd. (d).

<sup>116</sup> Cal. Code Regs., tit. 10, § 2661.1, subd. (c).

settlements are “fundamentally fair, adequate, reasonable and in the interests of justice.”<sup>117</sup>

Failure to obey these provisions raises a question as to whether a subsequent request for compensation is ripe for decision.

The parties contend that the definition of “proceedings” under Regulation section 2651.1, subdivision (h), does not apply the remainder of that regulatory chapter, and should be read narrowly based on the Department’s 2006 Statement of Reasons.<sup>118</sup> The parties further contend that stipulations and settlements entered into prior to the issuance of a Notice of Hearing are not subject to independent review by an Administrative Law Judge.<sup>119</sup> And lastly, the parties argue the established alternative procedure for rate review and processing is permissible and sufficient to properly conclude a rate application.<sup>120</sup>

The Chief Judge finds the parties’ arguments regarding their failure to comply with the Insurance Code and its regulations are unpersuasive. Notwithstanding the parties’ adoption of an alternate rate review procedure, the Chief Judge finds Consumer Watchdog’s request for compensation is timely filed and sufficient under the statute and regulations.

#### **I. The Parties Settled the Rate Application Outside the Statutory and Regulatory Procedure**

California voters enacted Proposition 103 to ensure that insurance is fair, available and affordable for all. To achieve that goal, the drafters established a public hearing process for reviewing insurance rate changes and entrusted the Insurance Commissioner with reviewing all rate change applications.<sup>121</sup> In furtherance of Proposition 103’s goals, the Commissioner promulgated a series of regulations outlining the rate review process in accordance with the

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<sup>117</sup> Ins. Code, § 1861.05, subd. (c)(3); Cal. Code Regs., tit. 10, § 2656.1, subd. (c).

<sup>118</sup> Department Brief at pp. 5-11.

<sup>119</sup> Department Brief at pp. 11-15.

<sup>120</sup> Consumer Watchdog Brief at pp. 2-3.

<sup>121</sup> *State Farm Mutual Automobile Ins. Co. v. Garamendi*, 32 Cal.4<sup>th</sup> at p. 1045.

Administrative Procedures Act. These approved regulations and the Insurance Code provisions comprise the only permissible rate review procedure. But as discussed below, the parties are operating outside the approved framework.

**A. All Proposed Settlements and Stipulations Must Be Reviewed by an ALJ**

Regulations section 2656.1 provides parties with the right to stipulate to the resolution of an issue of fact or law material to a proceeding, or agree to settlement on a mutually acceptable outcome to a proceeding. As defined by those same regulations, a proceeding is any action including a rate proceeding established upon the filing of a petition for hearing.<sup>122</sup> However, the Department contends section 2656.1's provisions regarding the review of proposed stipulations and settlements pertains only to those negotiated agreements that result after the issuance of a Notice of Hearing. To support its argument, the Department points to its 2006 Statement of Reason, filed with the Office of Administrative Law, amending Regulations section 2651.1, subdivision (h)'s definition of a "proceeding." But the Department's argument is unsupported by the section 2651.1, subdivision (h)'s plain meaning and case law interpreting it within the Department's regulatory framework. In addition, a different reading of Regulation sections 2651.1 and 2656.1 would thwart Proposition 103's intent. In fact, to adopt the Department's contention would render Regulations section 2656.1 effectively meaningless.

**1. The Definition of a "Proceeding" in Section 2651.1(h) Applies to All Subchapter 4.9 Regulations, Including Section 2656.1 Governing Proposed Settlements**

In 2006, the Department issued a Notice of Proposed Action to amend the prior approval regulations, including regulations governing consumer participation. Among the proposed changes was an amendment to Section 2651.1, subdivision (h) defining a "proceeding" under

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<sup>122</sup> Cal. Code Regs., tit. 10, § 2651.1, subd. (h).

Article 10.<sup>123</sup> The amendment defined a proceeding as “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.”<sup>124</sup> The Department proposed the amended definition “to ensure that consumer representatives are eligible to receive compensation when they make a substantial contribution” to the Commissioner’s order or decision prior to a formal hearing being granted or denied.<sup>125</sup> As explained, it was the Department’s practice to encourage consumer groups and insurance carriers to resolve rate challenges informally, so as to avoid litigation costs. In many cases, insurers withdrew their applications during negotiations, or after the consumer group filed a petition for hearing. Such results benefitted the public, and in many cases the Commissioner determined the consumer groups made a “substantial contribution” to the ultimate decision, even though a no hearing was held.<sup>126</sup> However, insurers began objecting to the compensation awards made in such circumstances, and the Department received an unfavorable superior court decision rejecting the Commissioner’s authority to make such awards.<sup>127</sup> As such, the Department sought to amend Regulations sections 2651.1 and 2661.1 to comport to the Commissioner’s view that rate application scrutiny would be curtailed if consumer representatives were denied compensation for their pre-hearing participation.<sup>128</sup> After public hearing and review by the Office of Administrative Law, the amendments became effective on January 28, 2007.

As amended, the following definitions presently apply to Subchapter 4.9, “Rules of

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<sup>123</sup> *Association of California Ins. Co. v. Poizner*, 180 Cal.App.4<sup>th</sup> at p. 1039.

<sup>124</sup> Cal. Code Regs., tit. 10, § 2651.1, subd. (h) (emphasis added).

<sup>125</sup> *Association of California Ins. Co. v. Poizner*, 180 Cal.App.4<sup>th</sup> at p. 1040. See also, Department of Insurance, Initial Statement of Reasons, file No. RH06092874, at p. 4.

<sup>126</sup> *Association of California Ins. Co. v. Poizner*, 180 Cal.App.4<sup>th</sup> at p. 1040.

<sup>127</sup> *American Healthcare Indemnity Company v. Garamendi* (2005) Los Angeles Superior Court, No. BS094515.

<sup>128</sup> *Association of California Ins. Co. v. Poizner*, 180 Cal.App.4<sup>th</sup> at p. 1040

Practice and Procedure for Rate Proceedings:”

(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.

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(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.

Despite the unambiguous definition of “proceeding” above, the Department contends the definition has an alternate meaning depending upon the provision it is used in. Specifically, the Department contends the term “proceeding,” for compensation purposes, means a petition for hearing or notice of hearing. The Department further argues “proceedings” takes on another meaning for settlement or stipulation purposes. However, this tortured reading is not supported by the regulations themselves, or California courts.

First, there is nothing vague or obtuse about the what constitutes a “proceeding” for purposes of Subchapter 4.9. The expanded definition of a proceeding encompasses both a rate proceeding and a rate hearing. While the Department spends much time urging the Court to limit section 2651.1, subdivision (h)’s the definition, as it applies to other regulations, neither its Statement of Reasons, nor any other evidence indicates the Department intended the expanded definition to apply only in compensation matters. Indeed, if the Department intended the amendments to apply only to compensation matters, the Department could have restricted its amendment to Regulation section 2661.1, subdivision (h), as that definition of “proceeding”

applies, on its face, only to intervention and intervenor's fees.<sup>129</sup> It took no such action.

In addition, the Department's failure to amend section 2656.1 in 2006 cuts against the parties' argument. At the time the Department amended the definition of "proceeding," Section 2656.1, subdivision (a) provided that "parties may stipulate to the resolution of an issue of fact or the applicability of a provision of law material to a proceeding, or may agree to settlement on a mutually acceptable outcome to a proceeding, with or without resolving material issues."<sup>130</sup>

Certainly as the drafter of section 2656.1, the Department was aware of the regulatory language.<sup>131</sup> If the Department intended for section 2656.1 to apply only to rate hearings, it could easily have revised that regulation when it amended the section 2651.1, subdivision (h) in 2006. It did not do so. Similarly, if the Department intended to define settlements and stipulations as agreements between parties to a rate hearing, it could easily have stated so. It did not. Instead, the Department left intact language indicating the stipulation and settlement regulation applied not to just rate hearings, but to all proceedings. To read otherwise, negates the regulation's plain language and substitutes intent where no action was taken. There is simply no support for the Department's argument that its silence indicated intent.

## **2. Case Law Also Supports ALJ Review of All Proposed Stipulations and Settlements**

Regulations section 2656.1 provides that the parties may stipulate to the resolution of an issue of fact or the applicability of a provision of law material to a proceeding, or may agree to settlement on a mutually acceptable outcome to a proceeding, with or without resolving material issues. As noted above, a "proceeding" is defined in the regulations as "any action conducted

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<sup>129</sup> Compare Cal. Code Regs., tit. 10, § 2651.1, subd. (h), which applies to all of Subchapter 4.9, with § 2661.1, subd. (h), which applies only to intervention and intervenor fees.

<sup>130</sup> Cal. Code Regs., tit. 10, § 2656.1, subd. (a) (emphasis added).

<sup>131</sup> There is a general presumption that official duties are regularly performed, which includes the proper adoption and awareness of regulations by state agencies. See, Evid. Code, §§ 660, 664.

pursuant to Article 10 . . . including a rate proceeding established upon the submission of a petition for hearing.” While the language establishing the beginning of a proceeding is unambiguous, the parties urge the Chief Judge to interpret “proceeding” under Regulations 2656.1, to mean “rate hearing” rather than proceeding. This interpretation is not, however, supported by case law.

In *Association of California Insurance Companies v. Poizner* (2009) 180 Cal.App.4<sup>th</sup> 1029, a group of insurers challenged the Department’s 2006 amendments modifying Regulations section 2651.1, subdivision (h). As explained above, the amendment to Section 2651.1, subdivision (h) clarified that a proceeding is established upon the submission of a petition for hearing. The stated impetus was to ensure consumer groups could show “substantial contribution” in situations where a rate application is resolved prior to a formal hearing being granted or denied.<sup>132</sup> The insurers argued the amendment unlawfully expanded the meaning of “proceeding” in Proposition 103, and asserted that the only permissible rate review proceeding is a public rate hearing resulting in a decision from the Commissioner.<sup>133</sup> In rejecting the insurers argument, the Court held that a rate proceeding commences with the submission of a petition for hearing or with a notice of hearing.<sup>134</sup> The Court further stated that “the regulatory scheme contemplates that the rate proceeding culminates in an order or decision by the Commissioner on the insurer’s rate application.” As such, the rate proceeding is part of the public rate-setting process.<sup>135</sup>

The Court went on to discuss that a rate hearing is also part of the rate-setting process.<sup>136</sup>

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<sup>132</sup> *Association of California Ins. Co. v. Poizner*, 180 Cal.App.4<sup>th</sup> at p. 1040.

<sup>133</sup> *Id.* at p. 1049.

<sup>134</sup> *Ibid* (emphasis added.)

<sup>135</sup> *Ibid.*

<sup>136</sup> “Rate Hearing” means a hearing noticed by the Commissioner on the Commissioner's own motion or in response to a petition for hearing pursuant to Insurance Code section 1861.05, which is conducted pursuant to the applicable

“A rate hearing may in some cases constitute part of the ‘rate proceeding,’ but a rate hearing is not necessary in all instances for the adoption of an order or decision by the Commissioner.”<sup>137</sup> As an example of when a rate proceeding could culminate in a decision by the Commissioner without a notice of hearing, the Court specifically pointed to Regulations section 2656.1. “Parties may stipulate to the resolution of an issue of fact or the applicability of a provision of law material to a proceeding, or may agree to settlement on a mutually acceptable outcome to a proceeding. Stipulations and settlements must be filed with the administrative law judge for proposed acceptance or rejection.”<sup>138</sup> The terms of a stipulation or settlement adopted by the administrative law judge shall be included in any proposed decision provided to the Commissioner. The Court concluded by stating “[t]he regulations thus permit the Commissioner to adopt an order or decision on a rate change application based on an approved settlement and without holding a formal hearing.”<sup>139</sup>

The Court reiterated its finding that all settlements are subject to administrative law judge review in addressing the insurers argument that expansion of the term “proceeding” would defeat Proposition 103’s system of public scrutiny and oversight. Specifically, the insurers alleged that by modifying the term proceeding, the Department established a “new prehearing proceeding into which consumer representatives could intervene and advance arguments - off the record and outside the public’s view.”<sup>140</sup> In rejecting this fear, the Court stated:

But in rate proceedings, intervention can only occur after an insurer files a rate change application, which is open to public inspection (citation omitted); public notice must be given of the rate change application (citation omitted); a petition for hearing

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procedural requirements of Insurance Code section 1861.08, and subchapters 4.8. and 4.9 of this chapter. (Cal. Code Regs., tit. 10, § 2661.1, subd. (i).

<sup>137</sup> *Id.* at pp. 1049-1050.

<sup>138</sup> *Id.* at p. 1050.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Id.* at p. 1052.



must be served on insurers and is available for public inspection (citation omitted); the petition for hearing, any response, any answer, and the Commissioner's decision to grant or deny a hearing are part of the record of the proceeding (citation omitted); and proposed stipulations and settlements must be served on all parties, filed with the administrative law judge, and included in the administrative law judge's proposed decision provided to the Commissioner (citation omitted). Given the regulatory scheme, which is "on the record" and open to public scrutiny, Insurance Companies have failed to establish the backroom scenario they imagine could occur.<sup>141</sup>

As explained by the Court, the settlement and stipulation provisions are an essential part of the rate proceeding framework, meant to ensure public oversight and protection, whether the rate proceeding commences with a petition for hearing or a notice of hearing. The settlements and stipulations, as well as the proposed decisions reviewing them, are subject to ALJ review whether the Commissioner grants or denies a hearing. As such, the parties' argument that a proceeding under Regulations section 2656.1 must be read as a "rate hearings" is unsupported.

### **3. Limiting ALJ Review Thwarts Proposition 103's Purpose**

Curiously, the Department contends ALJ review of proposed settlements and stipulations, prior to the issuance of a notice of hearing, is contrary public policy. But it is the parties' interpretation of Regulation 2656.1 that thwarts Proposition 103's stated intent by creating the exact backdoor scenario discussed in *Association of California Insurance Companies v. Poizner*, *supra*.

Proposition 103 purpose is to protect consumers from arbitrary insurance rates and practices, to encourage a competitive insurance marketplace and to ensure that insurance is fair, available and affordable.<sup>142</sup> To that end, the Insurance Code expressly precludes the Commissioner from approving rates that are "excessive, inadequate, unfairly discriminatory or

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<sup>141</sup> *Ibid*.

<sup>142</sup> *State Farm Mutual Automobile Ins. Co. v. Garamendi*, 32 Cal.4<sup>th</sup> at p. 1041.

otherwise in violation of the Insurance Code.”<sup>143</sup> In order to effectuate the initiative’s purpose, the Insurance Code mandates public hearings, ensures public participation and establishes an absolute rule in favor of public disclosure.<sup>144</sup>

This intent, however, is thwarted when settlements are made in secret and go unreviewed. In this matter, the parties’ settlement provides the public no information about the rate application, and does not include a finding that the rates are “fundamentally fair, adequate, reasonable and in the interests of justice.” The settlement makes no representations regarding whether the rate is excessive or discriminatory, nor does it list the California written premium for the prior calendar year or the Application’s proposed rate change.<sup>145</sup> Instead, the settlement states the agreed-upon rate and calls for the withdrawal of the petition for hearing.<sup>146</sup> The parties provide no evidence that this formulaic and vague settlement language furthers Proposition 103’s purpose or ensures compliance with the Insurance Code. Instead, the parties’ argument rests upon the idea that negotiated settlements, if made prior to a rate hearing, need not comply with the statutory and regulatory scheme. This is the exact backdoor scenario rejected by the Court in *Association of California Insurance Co. v. Poizner*.<sup>147</sup> As the Court made clear, pre-hearing, negotiated settlements cannot be made “off the record and outside the public’s view.” Instead, such settlements follow the rate review process which includes proposed stipulations and settlements “served on all parties, filed with the administrative law judge, and included in the

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<sup>143</sup> Ins. Code, § 1861.05, subd. (a).

<sup>144</sup> *State Farm Mutual Automobile Ins. Co. v. Garamendi*, 32 Cal.4<sup>th</sup> at pp. 1042-1043; Ins. Code, §§ 1861.05, subd. (c)(3), 1861.07.

<sup>145</sup> Cal. Code Regs., tit. 10, § 2656.1, subd. (e).

<sup>146</sup> Regulations section 2653.1, subdivision (a) provides that a petition for hearing is a “pleading.” Pleadings are formal allegations by the parties of their respective claims and defenses, for the judgment of the Court (Code Civil Proc., § 420.) Although outside the scope of this decision, the Chief Judge notes neither the Commissioner’s regulations, nor the Code of Civil Procedure, provide for the withdrawal of pleadings.

<sup>147</sup> *Association of California Ins. Cos. v. Poizner*, 180 Cal.App.4<sup>th</sup> at p. 1052.

administrative law judge's proposed decision provided to the Commissioner."<sup>148</sup> That is the only reading of section 2656.1 that furthers Proposition 103's intent and the public's right to participate in all rate proceedings.

Further, limiting ALJ settlement and stipulation review to rate hearings, permits insurance carriers and the Department to freeze out consumer groups from any negotiated resolution in contravention of Proposition 103's stated purpose of fostering public access and information. Section 2656.1, subdivision (g) provides that any party objecting to a proposed settlement or stipulation may file written objections and may request a hearing before an administrative law judge.<sup>149</sup> However, as the Department explained most rate applications settle prior to the issuance of a notice of hearing. If section 2656.1 applies only after a rate hearing commences, the public would be left with no opportunity to challenge the settlement and no means by which to review the settlement's fairness. Given Proposition 103's clear purpose of public participation and public disclosure, this limiting interpretation of section 2656.1 cannot be harmonized.

#### **4. Limiting ALJ Review Renders the Regulation Meaningless**

Lastly, limiting ALJ review of settlements and stipulations to rate hearings would effectively render the regulation meaningless. Although Insurance Code section 1861.05, subdivision (c)(3) provides that the Commissioner "must hold a hearing" when the proposed rate adjustment exceeds 7% of the then applicable rate for personal lines or 15% for commercial lines, in the past six years the Commissioner has failed to issue a single Notice of Hearing in

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<sup>148</sup> *Ibid.*

<sup>149</sup> Cal. Code Regs., tit. 10, § 2656.1, subd. (g). Written objections and a request for hearing must be filed within five days of service of the proposed settlement. Hearings shall take place within ten business days of the filing of objections.

such situations, including in the instant matter.<sup>150</sup> If a notice of hearing is a condition precedent to ALJ review of settlements and stipulations, and the Department chooses to ignore its statutory mandate to conduct public hearings, then this regulation is a hollow promise. The Chief Judge can find case law supporting the idea that regulatory language should be interpreted in a manner that renders it worthless or empty.

Based on the above discussion, the rules of regulatory construction and California case law support Regulations section 2656.1's clear language that where the parties enter into a stipulation or settlement, a proposed decision by an ALJ is required regardless of whether the Commissioner has issued a notice of hearing.

**B. Preference for an Alternative Process is Insufficient Grounds to Abdicate Statutory and Regulatory Mandates**

The parties have stated a preference for the Department's long-standing, informal rate review process, described below. However, the parties' preference for a non-codified, off the record process, cannot outweigh the duly enacted statutory and regulatory procedures.

It is uncontroverted that in every rate proceeding in which Consumer Watchdog has intervened since 2003, where the parties reached a three-way agreement after a Petition for Hearing was filed but prior to the issuance of a Notice of Hearing, the Department has followed the same practice.<sup>151</sup> First, the parties execute a three-way stipulated settlement setting forth the agreed-upon rate adjustment and terms. The settlement agreement also specifies that Consumer Watchdog will withdraw its Petition for Hearing upon the Commissioner's approval of the application on the agreed-upon terms. The insurer then amends its rate application pursuant to

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<sup>150</sup> The Commissioner has issued only one Notice of Hearing in the past six years. In that matter, the carrier refused to waive the "deemer period" and a Notice of Hearing was issued to protect the Department's review timelines. (See, Wawanesa General Insurance Company, PA-2022-00001). Although not discussed herein, the Chief Judge notes the Insurance Code does not permit a waiver of the deemer period. (See, Ins. Code, § 1861.05, subd. (c).)

<sup>151</sup> Consumer Watchdog Brief, p. 2.

the stipulated terms and publicly files the amendment on the Department's electronic rate application system. The Commissioner approves the amended application, and thereafter Consumer Watchdog withdraws its Petition for Hearing. The settlement agreement is not reviewed by an administrative law judge for fairness, and no finding is made by the Commissioner, or and ALJ, that the approved rate is neither excessive, arbitrary or discriminatory. The Department employs this procedure whether the proposed rate adjustment exceeds 7% for personal lines or 15% for commercial lines.

While the parties may prefer this alternate scheme for rate review and processing, the Commissioner and this Court are obligated to enforce the Insurance Code and its applicable regulations as written. Moreover, an unapproved procedure of general application, that interprets or enforces the Department's statutory obligation constitutes, an invalid underground regulation. And lastly, the parties' arguments regarding increased costs and delay are speculative and not well-taken.

**1. The ALJ and Commissioner Must Insist on Statutory Compliance**

The parties urge the Chief Judge to sanctify their established, informal rate review process, preferring this method to the one set forth in the Insurance Code and the regulations adopted thereunder. However, neither the Chief Judge nor the Commissioner may ignore Proposition 103's mandates, nor ratify procedures that do not comport with the law.

Government Code section 11475.20 governs the conduct of administrative law judges, and provides that the "Code of Judicial Ethics adopted by the Supreme Court pursuant to subdivision (m) of Section 18 of Article VI of the California Constitution for the conduct of judges governs the hearing and non-hearing conduct of an administrative law judge." Canon 1 of the Code of Judicial Ethics requires adherence to the rule of law. Specifically, Canon 1's

Comment states that “the integrity and independence of judges depend in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law and the provisions of this code.”<sup>152</sup> Similarly, Canon 2.A provides that a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. In interpreting these ethical mandates, California courts have held that a judge who intentionally disregards of the law may be subject to investigation by the Commission on Judicial Performance.<sup>153</sup> Accordingly, the Chief ALJ cannot intentionally disregard the Insurance Code provisions mandating public hearings, nor bless the parties informal rate review process to the extent it deviates from statutory and regulatory provisions.

Similarly, the Insurance Code requires the Commissioner to perform all duties imposed by the statute and regulations, and enforce the execution of the Insurance Code and other laws regulating the business of insurance.<sup>154</sup> This duty to perform and duty to enforce, under Insurance Code section 12921, are specifically applicable to the administration, enforcement and interpretation Proposition 103 and its regulations.<sup>155</sup> In addition, the Commissioner must require, from every insurer, full compliance with all Insurance Code provisions.<sup>156</sup> As such, the Commissioner must enforce all Insurance Code provisions and execute all duties imposed.

Voters enacted Proposition 103 to mandate public hearings and to ensure approved rates were fair, reasonable and not excessive, arbitrary or discriminatory.<sup>157</sup> The Department and consumer advocates are charged with protecting the public’s interest and effectuating the

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<sup>152</sup> Cal. Code Jud. Ethics, Canon 1.

<sup>153</sup> *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4<sup>th</sup> 371, 398; *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 826, 849-854.

<sup>154</sup> Ins. Code, § 12921, subd. (a).

<sup>155</sup> Ins. Code, § 1860.3.

<sup>156</sup> Ins. Code, § 12926.

<sup>157</sup> Ins. Code, § 1861.05, subd. (a), 1861.05, subd. (c)(3).

statute.<sup>158</sup> By failing to adjudicate rate increases over 7%, as mandated by Insurance Code 1861.05, subsection (c), the Department and consumer advocates thwart the stated purpose of Proposition 103 and leave the public without the promised protection. Similarly, when the parties ignore settlement regulations meant to provide specific oversight, California consumers are once again left without assurances that the implemented rate is fundamentally fair and reasonable. While the parties may prefer an abridged, behind the scenes rate review process that eschews the statutory and regulatory requirements, both the Commissioner and this Court are obliged to enforce the Insurance Code and its applicable regulations.<sup>159</sup> Failure to do so leaves the approved rate applications subject to collateral attack, and renders Proposition 103's protections meaningless.<sup>160</sup>

## **2. Adoption of an Alternative Process Constitutes an Underground Regulation**

The parties long-standing, alternative rate review process also raises concerns over whether the procedure constitutes an underground regulation in violation of the Government Code.

Government Code Section 11342.600 defines a "regulation" as "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." A state agency rule or regulation is subject to the Administrative Procedures Act if it has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific

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<sup>158</sup> Cal. Code Regs., tit. 10, § 2661.1, subd. (j); Ins. Code, § 12921, subd. (a).

<sup>159</sup> Cal. Code Jud. Ethics, Canons 1 and 2.A; Ins. Code, § 12921, subd. (a).

<sup>160</sup> *Ellena v. Department of Insurance* (2014) 230 Cal.App.4<sup>th</sup> 198 (a mandamus claim may be taken where the Insurance Commissioner violates a mandatory duty under the Insurance Code); *Green v. Ralee Engineering Co.* (1998) 19 Cal.4<sup>th</sup> 66, 90.

case; and second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure.<sup>161</sup> An unwritten governmental procedure can constitute an underground regulation if it meets the criteria for a regulation under the APA, but has not been adopted in accordance with the APA's procedural requirements.<sup>162</sup> In such cases, the procedure or set of rules are invalid.<sup>163</sup>

Here, the Department has adopted general procedure for the processing of rate applications that differs from the regulations adopted in conformance with the APA. As noted by Consumer Watchdog, the Department has used this procedure in every rate proceeding since 2003. And that general rate review procedure is intended to implement Proposition 103's mandate and interpret its statutory provisions. Based on the foregoing, it is the type of regulation that must be adopted in accordance with the APA's requirements. As there is no question the Department implemented this procedure outside the APA format, the procedure constitutes an invalid "underground regulation" and rates adopted pursuant to this process may be collaterally attacked.

### **3. Speculative Arguments Regarding Time and Expense Do Not Permit Adoption of Alternate Rate Processing Procedure**

The parties also contend adherence to the statutory mandates and regulatory provisions would increase costs and delay rate application processing. They argue instead extra-regulatory and non-adjudicative process to settle rate applications. While there is no doubt litigation is costly, neither the statute nor the regulations permit the parties to ignore the Insurance Code's mandates due to increased expenses. Nor is the parties' argument of increased delay well-taken. In this proceeding, State Farm filed its rate application on February 28, 2023 and the

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<sup>161</sup> *Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 1074.

<sup>162</sup> *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 333.

<sup>163</sup> *Naturist Action Com. v. Department of Parks & Recreation* (2009) 175 Cal.App.4th 1244, 1250.



Commissioner's approved the rate increase on December 22, 2023; a total of 297 days.

Conversely, the Insurance Code and regulations call for an adjudicatory process of 180 days.

Accordingly, this argument seems spurious, at best. Moreover, as the parties have failed to present the ALJ with their settlement for a review and proposed decision, any argument regarding delay is speculative and self-serving.

Consumer Watchdog also contends that because the ALJ did not raise alleged Insurance Code or regulatory violations prior to 2024, it is inappropriate to raise them at this time.<sup>164</sup> Consumer Watchdog does not provide any support for this proposition, and, in fact, California case law holds the opposite. California courts make it clear that governmental inaction rarely forms a proper basis to estop the government from enforcing a law intended to benefit the public.<sup>165</sup> As such, the Department's failure to enforce the Insurance Code and its regulations do not prevent the Department from ensuring compliance in the future. Moreover, as the parties settled this matter outside of the public eyes and the ALJ's review, the parties cannot now argue they are somehow prejudiced by the Administrative Hearing Bureau's illumination of statutory and regulatory violations.

Lastly, the parties contend, unpersuasively, that proposed stipulations and settlements cannot be reviewed by an administrative law judge because no judge had been assigned to the proceeding. This argument, however, fails to consider the regulatory language regarding ALJ powers. Regulation section 2654.1, subdivision (a) grants the administrative law judges power to control the course of the proceeding, from the commencement of a proceeding by petition for hearing or notice of hearing, through a decision on a proposed settlement or on the application's merits. And where an ALJ has not yet been assigned, the presiding administrative law judge

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<sup>164</sup> Consumer Watchdog Brief at p. 2:17-21.

<sup>165</sup> *West Washington Properties, LLC v. Department of Transportation* (2012) 210 Cal.App.4<sup>th</sup> 1136, 1146; see also, *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493.

exercises all authority set forth in this section 2654.1.<sup>166</sup> As such, any argument relying upon the lack of an assigned ALJ is without merit.

## **II. Consumer Watchdog's Request for Compensation is Timely Taken**

Notwithstanding the irregularities in processing and approving State Farm's rate application, the Chief Judge finds Consumer Watchdog's Request for Compensation is timely taken.

Regulation section 2662.3, subdivision (a) provides that an intervenor whose Petition to Intervene has been granted and who has been found eligible to seek compensation, may submit a request for compensation "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."

Although Consumer Watchdog pled timeliness for its Request for Compensation on the grounds that submission was "within 30 days after the conclusion of the entire proceeding," that argument is not fatal to its request. Consumer Watchdog submitted its Request for Compensation within 30 days of the Commissioner's Order closing the proceeding. While the Chief Judge finds the Order closing the proceedings to be procedurally flawed, there is no question that Consumer Watchdog submitted their request within 30 days of the Commissioner's "action," as permitted by the Regulation. Accordingly, the Request for Compensation is timely filed.

## **III. Consumer Watchdog Satisfied the Requirements for Compensation**

Consumer Watchdog's Request for Compensation satisfies both the statutory and regulatory substantive and procedural requirements for intervenor compensation. In addition, Consumer Watchdog's attorney and expert witness fees are reasonable. Accordingly, the Request

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<sup>166</sup> Cal. Code Regs., tit. 10, § 2654.1, subd. (d).

for Compensation must be granted.

**A. Consumer Watchdog Represented the Interests of Consumers and Made a Substantial Contribution to the Commissioner's Decision**

Consumer Watchdog satisfied the requirements of Insurance Code section 1861.10, subdivision (b) and Regulations section 2662.5 to “represent the interests of consumers” and to make “a substantial contribution” to the Commissioner’s action in connection with Application 23-563. Consumer Watchdog has a history of participation in Department proceedings and is a nationally recognized consumer advocacy group. In addition, on July 12, 2022, the Commissioner issued Consumer Watchdog a Finding of Eligibility stating “Consumer Watchdog represents the interests of consumers, and on those grounds, the Commissioner hereby finds Consumer Watchdog eligible to seek compensation in Department proceedings pursuant to [Insurance Code section] 1861.02 *et seq.*”<sup>167</sup>

As to substantial contribution, Consumer Watchdog’s Petition raised ten distinct and separate issues, including (1) State Farm’s net income in 2021 of \$436 million was not consistent with the large rate increase being proposed; (2) Applicant used an inflated value for the AOI trend for Homeowners that resulted in an inflated catastrophe provision; (3) Applicant’s excessive loss trend overstated the projected loss resulting in an inflated rate indication; (4) Applicant failed to explain why there was such a large difference between the paid and incurred development; (5) Applicant had not shown that all of its institutional advertising expenses had been reflected in the excluded expense provision; (6) Applicant had not explained or supported the decrease in reported California Finance / Service Charges as a reasonable basis for projecting future values; (7) Applicant had misapplied the applicable regulation for various reasons

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<sup>167</sup> Finding of Consumer Watchdog’s of Eligibility to Seek Compensation, dated July 12, 2022. That Finding was succeeded by the Commissioner’s Finding of Eligibility to Seek Compensation, dated Aug. 25, 2020, File No. IE-2020-0002, p. 4. Consumer Watchdog’s eligibility is effective until July 2022.

including, but not limited to, using the wrong basis of comparison; (8) Applicant had failed to prove that its selected loss; development was the most actuarially sound; (9) Applicant had failed to prove that its trend selections were the most actuarially sound; and (10) Applicant had not adequately supported other items in the filing, including wildfire mitigation discounts.<sup>168</sup>

Consumer Watchdog issued multiple requests for information and their intervention resulted in numerous responses from State Farm, all of which provided additional significant information in evaluating the rate application. In addition, Consumer Watchdog's attorneys and actuaries participated in discussions with the Parties, and their actuary prepared a written analysis and rate template, that served as the backdrop of settlement negotiations. Lastly, Consumer Watchdog's participation in negotiations resulted in a Stipulation that included an overall rate increase of 20%; resulting in an annual savings of \$200 million for State Farm policyholders.<sup>169</sup>

As such, Consumer Watchdog made a substantial contribution to the Commissioner's ultimate decision.

#### **B. Consumer Watchdog Met the Procedural Requirements for Compensation**

The Commissioner approved Consumer Watchdog's Petition to Intervene on July 26, 2022, and the Public Advisor found Consumer Watchdog eligible to seek compensation.<sup>170</sup>

Consumer Watchdog submitted a timely request for compensation and the request was verified.<sup>171</sup> It included detailed descriptions of the services and expenditures, legible time and billing records, and a description of Consumer Watchdog's substantial contribution.<sup>172</sup>

Accordingly, Consumer Watchdog met the procedural requirements for compensation.

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<sup>168</sup> Cal. Code Regs., tit. 10, § 2661.1, subd. (k).

<sup>169</sup> \$200 million = \$2.466 (annual earned premium) X (28.1%-20%) (difference between requested and approved overall rate. The approved rate is also lower than the rate suggested by the Department.

<sup>170</sup> Finding of Consumer Watchdog's of Eligibility to Seek Compensation, Aug. 25, 2020, File No. IE-2020-0002.

<sup>171</sup> Request for Compensation at p. 11.

<sup>172</sup> Request for Compensation at pp. 5-8; Pressley Decl., Exh. 1a.

### **C. Consumer Watchdog's Requested Fees Are Reasonable**

Consumer Watchdog billed at hourly rates of \$695 for Mr. Rosenfield, an attorney with 40 years' experience, \$595 for Ms. Pressley, an attorney with over 26 years of consumer advocacy experience, \$350 for Mr. Powell, an attorney with seven years' experience, \$250 for Mr. Mellino with two years' experience, \$450 for Mr. Armstrong, an experienced actuary, and \$200 for Ms. Gentile, a paralegal with over 14 years of litigation experience.<sup>173</sup> These rates are consistent with the current prevailing private sector rates for advocates in Los Angeles with similar experience, skill and ability.<sup>174</sup>

Consumer Watchdog billed a total of 210.3 hours in connection with the Application, including 41.4 hours from Mr. Rosenfield, 79.1 hours for Ms. Pressley, 52.4 hours for Mr. Powell, 8.3 hours for Mr. Mellino, 21.1 hours for Mr. Armstrong, and 8.9 hours for Ms. Gentile.<sup>175</sup> That time is reasonable for the work Consumer Watchdog performed reviewing the Application, preparing the Petition, engaging with its expert witness, preparing the Compensation Request, and engaging in related conferences, calls, correspondence and negotiations over nine months. None of Consumer Watchdog's advocacy fees were excessive for the nature and quality of work performed. Nor did that work duplicate the Department's participation, since Consumer Watchdog first raised most of the relevant the issues and arguments.

Mr. Schwartz's expert witness fees are also reasonable. Although there is little publicly available information regarding actuarial consulting fees, Mr. Schwartz provided the rates charged by other consulting actuaries in earlier prior approval cases. Adjusting those rates for

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<sup>173</sup> Pressley Decl. at ¶¶ 7, 9, 12.

<sup>174</sup> See Pressley Decl., Exh. 2 [fee expert declaration].

<sup>175</sup> RFC.

2024, Mr. Schwartz's fee of \$955 per hour is within a reasonable range, as are the rates for his associates. In addition, Mr. Schwartz's rates in this proceeding are consistent with his rates for other entities and jurisdictions. Mr. Schwartz spent 69.5 hours and Ms. Tollar spent 5.8 hours reviewing State Farm's Application, including its updated financial information and loss ratios. Mr. Schwartz's records were kept contemporaneously and there is no evidence suggesting Mr. Schwartz's rates exceed current market rates for actuarial services.<sup>176</sup> As such, Consumer Watchdog's advocacy and expert witness fees are reasonable.

### **III. Conclusions**

Notwithstanding the parties' failure to adhere to the statutory and regulatory provisions governing rate application processing and settlement, Consumer Watchdog is entitled to advocacy and expert witness fees in the amount of \$175,895.15, pursuant to Insurance Code section 1861.10, subdivision (b) and the regulations thereunder. Because Consumer Watchdog's advocacy was in response to State Farm's Application, State Farm must pay the award.<sup>177</sup>

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<sup>176</sup> Fees for Ms. Tollar are similarly reasonable and there is no evidence they do not reflect a reasonable rate for an Actuarial Assistant with over 20 years' experience.

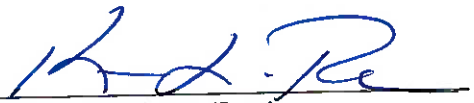
<sup>177</sup> Ins. Code, § 1861.10, subd. (b).

**ORDER**

1. Consumer Watchdog is hereby awarded \$175,895.15 in advocacy and expert witness fees in connection with State Farm's rate application (Prior Approval File No. PA-2023-00007).
2. State Farm shall pay the award no later than 30 days after the date of this Decision and shall notify the Department's Office of the Public Advisor upon making payment.<sup>178</sup>

Date: October 18, 2024

RICARDO LARA  
Insurance Commissioner

By:   
**Hon. Kristin L. Rosi**  
Chief Administrative Law Judge  
Administrative Hearing Bureau

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<sup>178</sup> Jon Phenix, Public Advisor, 300 Capitol Mall, Sacramento, CA. [jon.phenix@insurance.ca.gov](mailto:jon.phenix@insurance.ca.gov).

## PROOF OF SERVICE

Case Name/Number: In the Matter of the Request for Compensation of  
**CONSUMER WATCHDOG**  
File No. **RFC-2024-004**

I, Camille E. Johnson, declare that:

I am employed by the California Department of Insurance, Administrative Hearing Bureau, in the City of Oakland and County of Alameda. I am over the age of eighteen (18) years and not a party to this action. My business address is 1901 Harrison Street, 3<sup>rd</sup> Floor, Oakland, CA 94612.

I am readily familiar with the business practices of the California Department of Insurance for collecting and processing correspondence for mailing, electronic filing and electronic mail. On October 18, 2024, I served the **DECISION AWARDING COMPENSATION** regarding in the **Matter of the Request for Compensation of CONSUMER WATCHDOG**.

  X   **(By U.S. Mail)** on those identified parties in said action, by placing on this date, true copies in sealed envelopes, addressed to each person indicated, in this office's facility for collection of outgoing items to be sent by mail, pursuant to Code of Civil Procedure Section 1013.

  X   **(By Intra-Agency Mail)** on those identified parties in said action, by placing this correspondence in a place designated for collection for delivery by Department of Insurance intra-agency mail.

       **(By Facsimile transmission)** on those identified parties in said action, by transmitting said document(s) from our office by facsimile machine to facsimile machine number(s) shown below. Following the transmission, I received a "Transmission Report" from our fax machine indicating that the transmission had been transmitted without error.

  X   **(By Email)** on those identified parties in said action, in accordance with Code of Civil Procedure §1013, by emailing true copies thereof at the address set forth below.

### ***SEE ATTACHED PARTY SERVICE LIST***

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed in Oakland, California, on October 18, 2024.

October 18, 2024  
DATE

  
C. E. JOHNSON



**PARTY SERVICE LIST**

Name/Address

Method of Service

Harvey Rosenfield, SBN 123082  
Pamela Pressley, SBN 180362  
Benjamin Powell, SBN 311624  
Ryan Mellino, SBN 342497  
**CONSUMER WATCHDOG**  
6330 San Vicente Boulevard, Suite 250  
Los Angeles, CA 90048  
Tel No.: (310) 392-0522  
Fax No.: (310) 392-8874  
[harvey@consumerwatchdog.org](mailto:harvey@consumerwatchdog.org)  
[pam@consumerwatchdog.org](mailto:pam@consumerwatchdog.org)  
[ben@consumerwatchdog.org](mailto:ben@consumerwatchdog.org)  
[ryan.m@consumerwatchdog.org](mailto:ryan.m@consumerwatchdog.org)  
[kaitlyn@consumerwatchdog.org](mailto:kaitlyn@consumerwatchdog.org)

(via E-mail and U. S. Mail)

Heather Hoesterey, Deputy General Counsel  
Nikki McKennedy, Esq.  
Melissa Wurster  
Deirdre Digrande  
Rate Enforcement Bureau  
Legal Division, Rate Enforcement Bureau  
**CALIFORNIA DEPARTMENT OF INSURANCE**  
1901 Harrison Street, 4<sup>TH</sup> Floor  
Oakland, CA 94612  
Tel. No.: (415) 538-4111  
Fax No.: (510) 238-7830  
[Heather.Hoesterey@insurance.ca.gov](mailto:Heather.Hoesterey@insurance.ca.gov)  
[Nikki.McKennedy@insurance.ca.gov](mailto:Nikki.McKennedy@insurance.ca.gov)  
[Melissa.Wurster@insurance.ca.gov](mailto:Melissa.Wurster@insurance.ca.gov)  
[Deirdre.Digrande@insurance.ca.gov](mailto:Deirdre.Digrande@insurance.ca.gov)  
[Tina.Warren@insurance.ca.gov](mailto:Tina.Warren@insurance.ca.gov)

(via Inter-office and E-mail)

Vanessa O. Wells, Esq.  
Victoria C. Brown, Esq.

**HOGAN LOVELLS US LLP**

855 Main Street, Suite 200  
Redwood City, CA 94063

Tel No.: (650) 463-4000

Fax No.: (650) 463-4199

[Vanessa.wells@hoganlovells.com](mailto:Vanessa.wells@hoganlovells.com)

[Victoria.brown@hoganlovells.com](mailto:Victoria.brown@hoganlovells.com)

(via Email and U.S. Mail)

Jordan D. Teti, Esq.

**HOGAN LOVELLS US LLP**

1999 Avenue of the Stars, Suite 1400

Los Angeles, CA 90067

[Jordan.teti@hoganlovells.com](mailto:Jordan.teti@hoganlovells.com)

(via Email and U. S. Mail)

**NON-PARTY**

Jon Phenix

Public Advisor

Tina Warren

Office of the Public Advisor

**CALIFORNIA DEPARTMENT OF INSURANCE**

300 Capitol Mall, 17<sup>th</sup> Floor

Sacramento, CA 95814

Tel No.: (916) 492-3705

Fax No.: (510) 238-7830

[John.Phenix@insurance.ca.gov](mailto:John.Phenix@insurance.ca.gov)

(via Email)