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DATE: March 20, 2009

Please deliver the following message:

TO:	FAX NO:
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FROM: William R. Pittman

NUMBER OF PAGES (including transmission sheet): 6

OPERATOR:

Please call us if the message you received was incomplete or not legible. The telephone number is (919) ~~755-4100~~ 792-4950.

MESSAGE: The attached order was filed late this afternoon. I'll be in Robeson County this week, but you may relay messages to me via Terry or Heather.

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
09 CVS 1980

FILED
2009 MAR 20 PM 4:34
WAKE COUNTY, C.S.C.
BY ___

Dare County, Washington County, Currituck County, Hyde County, Carteret County, New Hanover County, Town of Nags Head, Town of Duck, Town of Southern Shores, Town of Indian Beach, Town of Pine Knoll Shores, Town of Emerald Isle, Town of Cape Carteret, Town of KillDevil Hills, City of Wilmington, Starco Realty & Construction, And Joseph M. Geraghty, Petitioners	)	ORDER
v.	)	
The North Carolina Department of Insurance, Commissioner of Insurance Wayne Goodwin, North Carolina Insurance Underwriting Association, and North Carolina Joint Underwriting Association, Respondents	)	

THIS MATTER BEING HEARD by the undersigned Superior Court Judge at the February 4 session of Wake County Superior Court on the Petitioners' Petition for Judicial Review, Motion for Stay, and Request for Declaratory Judgment and Writ, and the Court having taken the matter under advisement to study the ample filings of the parties, the Court now makes the following findings and conclusions.

JURISDICTION

The jurisdiction of this Court is a hotly contested matter among the parties and is, of course, a threshold issue in this matter. Ordinarily, rate case issues emanating from the Commissioner of Insurance are appealable to the North Carolina Court of Appeals pursuant to N.C.G.S. §7A-29 and N.C.G.S. §58-2-80. The latter statute requires for appellate review "[an] order or decision that the premium rates charged or filed on all or any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory or are otherwise not in the public interest." While the rate increases that are the subject matter of this dispute may well be a result of the existing rates being inadequate or not in the public interest, there is no such finding by the Commissioner or his designee in the record provided to the Court. Had such a finding been made, appeal would lie to the Court of Appeals which the statutes appear to contemplate to be the court to hear ratemaking

matters. Nor can such a finding be inferred from the correspondence, both internal and external, in the record.

N.C.G.S. §58-2-75 provides for review by the Superior Court of Wake County of "ANY order or decision made, issued or executed by the Commissioner" (emphasis added) with certain exceptions, one of which being the kind of order appealable to the Court of Appeals. N.C.G.S. §58-45-50 provides that an action of the Commissioner approving rates or other acts of the "Beach Plan" Association is appealable as provided in N.C.G.S. § 58-2-75. N.C.G.S. §58-46-30 provides that an action of the Commissioner approving acts of the "Fair Plan" Association is appealable as provided in N.C.G.S. §58-2-75. N.C.G.S. §7A-245 provides that the Superior Court is the proper forum "where the principal relief prayed is injunctive relief [or declaratory relief concerning]...any statute, ordinance or regulation." N.C.G.S. §7A-250 sets the Superior Court as the proper forum for "review by original action or proceeding, or by appeal, of the decisions of administrative agencies", with certain exceptions, one of which being decisions of the Commissioner of Insurance under the previously mentioned N.C.G.S. §52-2-80.

Chapter 58 is confusing and often contradictory. For instance, the November approval letters from the Commissioner's designee say that approval is given pursuant to N.C.G.S. §58-45-45. That section requires filings for rate increases to be governed by Articles 40 and 41 of Chapter 58. Article 40's Scope of Application says it does not apply to residential property insurance. Article 41's Scope says it specifically does not apply to insurance written under Articles 45 and 46, the Beach and Fair Plan articles. Article 40 establishes standards for rate increases and clearly contemplates a hearing by the Commissioner or his designee from which findings can be had and an order issued. Appeal can then be had to the Court of Appeals. Also, Article 40, in N.C.G.S. §58-40-100, provides that "[a]ny person aggrieved by any rate charged [or] rate plan...may request the insurer or rating organization to review the manner in which the rate or plan is applied with respect to insurance afforded him. Such aggrieved person upon refusal of the insurer or organization to grant such a review may file a complaint and request for a hearing with the Commissioner. N.C.G.S. §58-40-105(b) provides that ANY order or decision of the Commissioner shall be subject to judicial review as provided in Article 2 of Chapter 58. Whether Chapter 40 applies is relevant to whether the Commissioner acted according to law, but is similar in its appeal provisions.

Both sides also cite Chapter 150B as authority for their positions on this Court's jurisdiction. N.C.G.S. §58-2-70(h) provides that "[u]nless otherwise specifically provided for, all administrative proceedings under this Chapter are governed by Chapter 150B of the General Statutes." The cases of which the Court is aware dealing with judicial review cite the judicial review provisions of Chapter 150B as expanding, not limiting, this Court's jurisdiction to hear administrative matters. In re: McCrary, cited by Respondent as supporting its position on the jurisdiction issue, and its predecessor Reinsurance Facility v. Long, both began as appeals of a decision of the Commissioner of Insurance to Superior Court, and deal with the scope of judicial review, not the Superior Court's jurisdiction. N.C.G.S. §58-2-53 limits the application of Chapter 150B in rate approvals to "the person making the filing or any person who intervenes in the filing."

So, while Chapter 150B might apply to the four petitioners whose petition was denied, since they would be parties to the decision to dismiss their petition, there is ample authority under Chapter 58 and Chapter 7A which "otherwise specifically provid[e] for" the petitioners to seek redress in Superior Court. The denial of the petition to intervene may keep Petitioners from pursuing the matter under Chapter 150B, but it does not divest them of other rights granted by statute. It is therefore the conclusion of the Court that it has jurisdiction to hear this matter.

Respondents cite the filed rate doctrine as a limitation on the Court's subject matter jurisdiction in this matter and urge the Court to refuse to hear the matter on that basis. The filed rate doctrine originated in an anti-trust context and has been adopted by North Carolina appellate courts as a limit on the ability to collaterally attack regulatory decisions of a regulator in actions for damages against third parties. Both cases cited by Respondents involve Chapter 75 actions by third parties for damages against insurers, alleging unfair and deceptive conduct on the part of the insurers which resulted in increased rates being approved by the Commissioner of Insurance.

Here, there is no claim for damages against the insurers, nor any allegation of wrongdoing by the insurers. There is no relief prayed from the insurers. There is a direct attack on the lawfulness and constitutionality of the action, or inaction, of the Commissioner of Insurance. None of the decisions in North Carolina or in other jurisdictions can be read as preventing an affected person from making a direct attack on the lawfulness of the regulator's action or its compliance with constitutional requirements. North Carolina has always allowed direct appeal of rate decisions of the Commissioner of Insurance, although such appeal is more commonly taken by the company whose rate request has been denied. Because the insurers are quasi-governmental entities which would be directly affected by an injunction or stay resulting from a successful challenge to the Commissioner's action or inaction, they should remain parties.

The cases applying the filed rate doctrine do hold the instructive principle that the regulator is far better suited to determine a proper rate than the Court. The Court agrees that the regulator is best suited to determine a proper rate, but the rate needs to be set in a manner, pursuant to a process, and upon a record from which appeal may be taken.

STANDING

The Court can find no authority in the statutes, in the cases, or in the constitutions of North Carolina or the United States for the proposition which seems to be pressed by the Respondents that insurers have appeal rights from administrative decisions but insureds do not. It appears that the Respondents contend that even the denial of the Petitioners' request to be heard is not reviewable by any court; that no matter whether the administrative act was unlawful, arbitrary or capricious, there is no appeal to be had by a non-party, that the Petitioners' only method of redress is the ballot box or the General Assembly. The Court can find no authority for that contention. There is no representative of the "using and consuming public" automatically made a party in rate-

making decisions as in some other regulatory schemes. The Department of Insurance has the responsibility of protecting the people, insurers and insureds alike. The protection of the people may well rely as heavily upon ensuring the health of the insurer as upon providing affordable rates, but the statutes contemplate, and the cases hold, that those actions taken by the Department in striking that balance are reviewable by the courts.

Those insured by the Beach or Fair plans are certainly "persons aggrieved" by approval of the rate increases. The local government petitioners are clearly among the principal beneficiaries of the Beach Plan's purpose of helping remove impediments to "the orderly growth and development" of the affected areas and helping assure an adequate market for essential property insurance in their geographic region. Likewise, local governments are clearly affected by the FAIR Plan's purpose concerning the "improvement of properties" and the "arrest [of] the decline of properties" within their borders.

MOTION FOR STAY

While the Petitioners' claim of irreparable injury is somewhat speculative, and while there is no evidence in the record of likely irreparable injury to Petitioners, irreparable injury is not as important as preserving the status quo and protecting the Petitioners' rights during the course of litigation. The likelihood of Petitioners prevailing on the merits has not been challenged seriously by Respondents, only whether they have any right at all to be heard. The dismissal of Petitioners' action at the Department of Insurance on essentially procedural grounds did not address the merits of their substantive contentions. The absence, in the record available to the Court, of the kind of findings contemplated by the statutes lends credibility to Petitioners' claims.

Whether Petitioners' prayer for injunctive relief is a disguised request for a *writ of mandamus* is not an essential inquiry at this point. While denial of a motion to intervene is most likely discretionary in nature and not properly subject to *mandamus*, performance of statutory duties contrary to law or failing to perform in accord with law and constitutional principles are likely to be found to be ministerial duties of the Commissioner of Insurance and subject to *mandamus*. A stay of the rate approval is the only way the Court can preserve the status quo pending a proper hearing on the merits by the rate-making authority and the making of a proper from which appeal may be taken.

BASED UPON THE FOREGOING, the Court makes the following

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties to this petition.

2. The Court has jurisdiction over the subject matter of this petition.

3. The Petitioners have standing to bring this action.

4. The Commissioner of Insurance is the proper authority to determine whether a rate increase should be approved.

5. Such determination should be made according to statutory and constitutional requirements and principles.

6. Such determination should be made upon a record from which an appeal contemplated in N.C.G.S. 58-2-80 can be had to the North Carolina Court of Appeals.

7. It does not appear from the available record that the Commissioner of Insurance acted according to law.

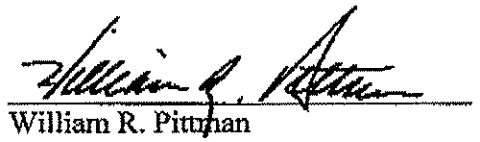
8. Petitioners are likely to prevail on the merits, at least as to whether proper procedure was followed in determining whether to grant the requested rate increases.

9. Preservation of the status quo and protection of Petitioners' rights pending litigation of the petition requires a stay of the rate approvals.

IT IS, THEREFORE, HEREBY ORDERED that the November 21 approvals by the Commissioner of Insurance of the rate increase requests of the North Carolina Insurance Underwriting Association and the North Carolina Joint Underwriting Association are hereby stayed and the Department of Insurance is hereby enjoined from enforcing said decisions.

IT IS FURTHER ORDERED that the matter be remanded to the Department of Insurance for such proceedings as will allow for proper findings and a proper record from which appeal can be had to the North Carolina Court of Appeals.

This the 20th day of March, 2009.



William R. Pittman
Superior Court Judge Presiding