STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PREFFERED MUTUAL INSURANCE COMPANY,	)	
Petitioner,	)	
vs.	)	**CASE NO. 96-5981RE**
DEPARTMENT OF INSURANCE,	)	
Respondent,	)	
and	)	
FLORIDA WINDSTORM UNDERWRITING ASSOCIATION,	)	
Intervenor.	)	

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, Mary Clark, held a formal hearing in the above-styled case on January 16, 1997, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

Department of Insurance emergency rule 4ER95-1, effective August 1, 1995, adopted by reference certain amendments to the Florida Windstorm Underwriting Association (FWUA) Plan of Operation and Articles of Agreement.

The amendments included a provision that membership in FWUA shall terminate at the end of the association year during which the member is no longer licensed to transact property insurance in the state. Sued for an assessment to pay claims resulting from Hurricane Opal, Preferred Mutual Insurance Company now challenges the emergency rule, and more particularly the extended membership provision.

Issues for disposition in this case are the standing of Preferred Mutual and the validity of 4ER95-1.

PRELIMINARY STATEMENT

The petition for administrative determination of the invalidity of emergency rule 4ER95-1 was filed on December 24, 1996; the petition requests a determination that the rule is invalid pursuant to sections 120.54(8) and (9), Florida Statutes (1995), and seeks attorneys' fees and costs pursuant to section 120.595(3), Florida Statutes (1996).

After a hearing, an order entered on January 13, 1997, granted an unopposed motion for continuance and FWUA's motion to intervene (opposed by Preferred Mutual).

At the formal hearing Preferred Mutual presented the testimony of its vice-president for research and development, Lynn John Woodard; FWUA presented the testimony of its executive director, Rebecca James Fussell. Preferred Mutual's exhibits no. 1-9 were received in evidence; its exhibit no. 10, a letter with attached return receipt, was marked for identification and taken under advisement. FWUA's exhibits no. 1-8 were received in evidence. FWUA exhibit no. 9, a deposition of David Koschik; and FWUA exhibit no. 10, with an attached certification, were marked for identification and taken under advisement. The exhibits taken under advisement are now received in evidence, but are of limited probative value as discussed below.

After a February 6, 1997 telephone hearing, Preferred Mutual's motion for continuation of hearing, to re-open evidence and for issuance of deposition subpoenas, was DENIED. (See order entered February 6, 1997).

The formal hearing transcript was filed on January 31, 1997; the parties filed proposed final orders on February 7 and February 10, 1997.

FINDINGS OF FACT

The Parties

1. Petitioner, Preferred Mutual Insurance Company (Preferred) is an advance premium cooperative organized under the laws of the State of New York, with its principal place of business in the State of New York.

2. During 1995, at least until September 24, 1995, Preferred was a member of the Florida Windstorm Underwriting Association (FWUA).

3. FWUA is an unincorporated association of private insurance companies organized under the authority of section 627.351(2), Florida Statutes, to provide windstorm insurance coverage to those "...applicants who are in good faith entitled to, but are unable to procure, such insurance through ordinary method." Section 627.351(2)(a), Florida Statutes (1995). The applicants are from geographical areas determined to be eligible pursuant to section 627.351(2)(c), Florida Statutes.

4. The Department of Insurance (DOI) is the state agency responsible for enforcing and interpreting the Florida Insurance Code, including Chapters 624 through 631, Florida Statutes. Bill Nelson is the Treasurer and Insurance Commissioner of the State of Florida.

Hurricane Season

5. Hurricane Andrew occurred in August 1992, with lasting impact on the insurance industry in Florida. In March 1993, DOI approved new windstorm eligible areas including Dade and Broward

County, thus substantially increasing the exposure of FWUA to potential loss.

6. In 1994 and 1995, in the event of a windstorm in its covered territory, the only process available to FWUA to pay claims exceeding funds on hand from premiums was to assess FWUA members. In 1994, the Florida legislature amended section 627.351(2), Florida Statutes to limit assessments to ten percent of gross written premiums for the state.

7. The FWUA board began investigating methods of meeting its responsibility to continue paying claims on a timely basis. The board directed its executive director to contact reinsurers for proposals, but the proposals she received did not provide sufficient coverage or were prohibitively costly. When this more traditional method became unavailable, FWUA, in early 1995, commenced seeking a $1 billion line-of-credit from the banking industry.

8. By spring of 1995 the FWUA board and its executive director were heavily involved in obtaining banking proposals, negotiating with the banks and educating them regarding FWUA. In May 1995, the board determined to negotiate further with Chase Manhattan Bank, with other banks participating in syndication through that bank. The education process included many telephone calls and meetings to explain statutory restrictions, the assessment pool and FWUA’s relationship to the voluntary market. Once that process was accomplished, and after the banks were

given a deadline to decide whether they wanted to participate, FWUA had to negotiate a credit extension contract acceptable to the selected banking syndicate.

9. In its negotiations the syndicate insisted on assurances that the FWUA membership base was reasonably stable and predictable, and that assessments of members could reasonably be expected to cover repayments to the banks. The banks, through counsel, reviewed FWUA's governing documents, and DOI and FWUA drafted necessary amendments to the documents.

10. Meanwhile, the 1995 hurricane season commenced and Hurricane Allison hit Florida the first week of June. It became urgent that the line-of-credit contract be closed as soon as possible before Labor Day when historically the hurricane season is most active.

The Emergency Rule

11. On July 21, 1995, FWUA's executive director, Rebecca Fussell, sent amendments to the Plan of Operation and Articles of Agreement to all FWUA members with a ballot form for their vote. The three-page cover letter outlines the purpose of the line-of credit and the need for immediate action by the members. The letter also includes this language:

> The above is a brief description of the principal points covered by the proposed amendments regarding the line of credit. The Department of Insurance has, in addition, asked that Article IV of the Articles of Agreement be clarified to provide that the obligations of members who cease doing business during the year extends to December

> 31st of that year, and a change in Article IV has been made to accomplish this. You are urged to review the attached in its entirety.
>
> (Petitioner's exhibit no. 9)

12. Prior to August 1995, the FWUA Articles of Agreement, Article IV, Membership, provided:

> Eligibility. Every Insurer licensed to transact property insurance on a direct basis in the State shall be a Member of the Association.
> Termination. Membership of any Member shall terminate when such member is no longer licensed to transact property insurance in the State. Any member whose membership in the Association has been terminated shall, nevertheless, continue to be governed by the Plan of Operation and the Articles of Agreement in order to complete its obligations for the current Association Year with regard to any assessments, losses, expenses, contracts or undertakings under the Plan of Operation.
>
> (Petitioner's exhibit no. 6)
> (emphasis added)

The August 1995 version provides:

> Eligibility. Every Insurer licensed to transact property insurance on a direct basis in the State shall be a Member of the Association.
> Termination. Membership of any Member shall terminate at the end of the Association Year during which such Member is no longer licensed to transact property insurance in the State. Any member whose membership in the Association has been terminated shall, nevertheless, continue to be governed by the Plan of Operation and the Articles of Agreement in order to complete its obligations with regard to any assessments, losses, expenses, contracts or undertakings under the Plan of Operation.
>
> (Petitioner's exhibit no. 2)
> (emphasis added)

13. By July 28, 1995, a 56% weighted majority of FWUA members had approved the amendments.

14. On August 2, 1995, DOI filed with the Secretary of State emergency rule 4ER95-1, a statement of the facts and circumstances supporting the emergency rule, and modifications to the FWUA Plan of Operation and Articles of Agreement incorporated by reference in the emergency rule. On August 18, 1995, the notice of adoption of emergency rule 4ER95-1 was published in the Florida Administrative Weekly.

15. The text of the Amended and Restated Plan of Operation and Restated Articles of Agreement filed with the Secretary of State is substantially the same as that provided to the members on July 21, 1995.[1]

16. The text of the published rule adopts by reference the August 1995 version of the FWUA's Amended and Restated Plan of Operation and Restated Articles of Agreement, thus superseding the previous March 1990 version adopted by reference in DOI rule 4J-1.001, Florida Administrative Code.

17. The notice of emergency rule 4ER95-1 appearing in the August 18, 1995, Florida Administrative Weekly outlines specific reasons for finding an immediate danger to the public health, safety or welfare. Those reasons include the potential exposure of FWUA to claims beyond its capacity to immediately pay. The reasons recount the search for alternatives and Chase Manhattan

Bank's offer of a line-of-credit, which offer needed to be accepted by August 15, 1995.

18. The notice of 4ER95-1 also details the background of increased exposure of FWUA and the need for the FWUA to find a ready source of funds to promptly pay claims in the event of a hurricane. The notice describes the urgency for amendments to the Plan of Operation; and the notice explains the reasons for concluding that the procedure used for promulgating the emergency rule is fair under the circumstances. Finally, the notice summarizes the rule, as follows:

> SUMMARY OF THE RULE: Emergency rule 4ER95-1 (4J-1.001) adopts a revised Plan of Operation and Articles of Agreement for the FWUA. The revisions provide additional definitions, describe the powers and duties of the FWUA; authorize borrowing of funds for deficits and the issuance of bonds; permits [sic] the pledging of assessments for a line of credit; provides [sic] notice for assessments for debt service; provides [sic] procedures for obtaining approval of credit and need therefor; provides [sic] criteria for the subsidiary authorized by law; and procedures for the issuance of government bonds.

Post-Amendment Events

19. In the culmination of a lengthy process during which Preferred attempted to withdraw as an insurer in the state of Florida, Preferred's vice-president for research and statistics, Lynn J. Woodard, on September 28, 1995, addressed a letter to Honorable Bill Nelson, Treasurer and Insurance Commissioner, Florida Department of Insurance, The Capitol, PL-11, Tallahassee, Florida 32399-0300. The letter provides, in pertinent part:

> Effective September 24, 1995, Preferred Mutual is surrendering its Certificate of Authority to transact insurance in the State of Florida.
> The reason for this surrender will be evident if you review the Consent Order signed by your office on June 9, 1995, in Case Number: 07376-93-C(SMH).
>
> (Petitioner's exhibit no. 10; FWUA's exhibit no. 10)

20. The date that the letter was received at DOI is a matter of dispute between the parties. A copy of the letter produced by DOI reflects that it was stamped received in "P&C Solvency, Office of the Chief" on October 10, 1995. Preferred's copy of the letter, from Lynn Woodard's file, has a post office return receipt attached, which receipt reflects that an article addressed to Honorable Bill Nelson in the same manner as Woodard's letter, was delivered on October 2, 1995, and was stamped by the Department of Insurance and Treasurer, State Fire Marshall. DOI insists the letter was received on October 10, 1995; Preferred claims that it was delivered on the earlier date. For purposes of this proceeding it is unnecessary to resolve the conflict or to establish precisely when the letter was received by DOI.

21. Hurricane Opal hit Florida on October 4, 1995, the last major event in an extremely active hurricane season, a season which produced the greatest losses in FWUA's history.

22. On or about October 17, 1995, FWUA sent an assessment of $243,509.00 to Preferred Mutual for Hurricane Opal. Preferred

has not paid the assessment and contests the liability which is the subject of a lawsuit pending in Jacksonville, Florida.

23. The amended complaint in Florida Windstorm Underwriting Association v. Preferred Mutual Insurance Company, case no. 96-3879, in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, alleges in paragraph 10:

> 10. As of January 1, 1995, and through September 23, 1995, Preferred was an insurer licensed to transact property insurance on a direct basis in the State of Florida. Effective September 24, 1995, Preferred withdrew from the State of Florida and surrendered its certificate of authority. However, by virtue of its license to transact property insurance on a direct basis in this state in 1995, Preferred was a member of FWUA for the entire calendar year 1995 and subject to the terms of the Amended Plan, including liability for any assessments levied by the Board on its members for the year 1995.
>
> (Petitioner's exhibit no. 7)

24. In that same civil action, an "Order on Defendant's Motion to Dismiss Complaint", paragraph 2, states:

> 2. Based upon the statement by counsel for Plaintiff, made on the record of this hearing, to wit, that the document attached to the Complaint is not a "contract" with the Defendant, and that the Complaint is not based on breach of contract but is actually based on an alleged "obligation" arising by virtue of Department of Insurance Emergency Rule 95-1, which rule allegedly adopted the amended Plan of Operation and Articles of Agreement of the Plaintiff association, thereby allegedly conferring on the Plan the force of law and allegedly binding PREFERRED to the terms and conditions thereof; and, further based upon the amendment of the Complaint instanter, over objection of Defendant, at the hearing of this cause, wherein Plaintiff was given leave to amend

> the Complaint to allege "obligation" rather than "contract," PREFERRED'S Motion to Dismiss on this first ground is hereby denied.
>
> (Petitioner's exhibit no. 8)

Final Analysis

25. Most of the changes to the Plan of Operation and Articles of Agreement, adopted by reference in 4ER95-1, were essential to FWUA's closing on the line-of-credit offer. These essential changes are described in the emergency rule notice's summary of the rule. Without those changes, FWUA did not have the authority to accept the Chase Manhattan Bank offer. FWUA and DOI acted promptly and prudently to identify a source of funds and to effectuate the changes necessary to secure that source. The need for emergency action was not occasioned by avoidable delay or administrative inaction.

26. The need for emergency changes to the Articles of Agreement, Article IV, membership provisions, however, is not described in the notice of the rule nor is the need established in the record of this proceeding. While the banks were interested in assuring a stable and identifiable membership subject to assessments, there is no evidence that the changes to Article IV were a condition of extending credit to FWUA. Those changes, according to FWUA's executive director, were requested by DOI, and were merely part of the documents reviewed and approved by the bank.

27. More significantly, for purposes of this proceeding, the Article IV membership changes are nowhere mentioned in the text of the emergency rule notice provided to the public in the Florida Administrative Weekly. Those membership changes, which are very different from the powers and duties amendments, are not included in the valid and specific justification for the emergency adoption of the amended plan of operation.

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction pursuant to sections 120.56 and 120.57(1), Florida Statutes (1996).

29. Section 120.56(1)(a), Florida Statutes (1996), provides:

> Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.

30. Although emergency rule 4ER95-1 is no longer in effect, Preferred is currently experiencing the impact of the rule and may still challenge its validity. Witmer v. Dept. of Business Regulation, 662 So.2d 1299 (Fla. 4th DCA 1995)

31. Preferred's standing in this proceeding is derived from the civil suit described in paragraphs 23 and 24, above. The challenged emergency rule is the backbone of that suit. It is unnecessary to determine whether Preferred surrendered its license before or after Opal hit Florida, and it is impossible,

based on the record in this proceeding to make that determination. Aside from the dispute of when the September 28, 1995 surrender letter was actually received, there are other factual and legal issues, not addressed by the parties in this proceeding, regarding when a license to transact property insurance in Florida is deemed terminated.

32. Those are issues to be resolved in the civil suit. It is enough here to show that the challenged rule is being applied against the challenger. By analogy, a party subject to discipline under an alleged invalid rule need not concede its guilt in order to challenge the rule.

33. Preferred, which has the burden of proof in this matter,[2] argues four bases for the invalidity of 4ER95-1:

> a) The rule impermissibly modifies the statute implemented;
> b) DOI has no authority to amend the Articles of Agreement;
> c) There was no emergency justification for the rule; and
> d) Amendment through incorporation was illegal. (see, section 120.52(8), Florida Statutes (1995))

34. Section 624.308(1), Florida Statutes, describes DOI's rule-making authority:

> 624.308 Rules.
> (1) The department may adopt reasonable rules necessary to effect any of the statutory duties of the department. Such rules shall not extend, modify, or conflict with any law of this state or the reasonable implications of such laws.

35. Section 627.351(2), Florida Statutes (1995), the "law implemented" by 4ER95-1, provides, in pertinent part:

(2) WINDSTORM INSURANCE RISK APPORTIONMENT.-

(a) Agreements may be made among property insurers with respect to the equitable apportionment among them of insurance which may be afforded applicants who are in good faith entitled to, but are unable to procure, such insurance through ordinary methods; and such insurers may agree among themselves on the use of reasonable rate modifications for such insurance. Such agreements and rate modifications shall be subject to the applicable provisions of this chapter.

(b) The department shall require all insurers licensed to transact property insurance on a direct basis in this state to provide windstorm coverage to applicants from areas determined to be eligible pursuant to paragraph (c) who in good faith are entitled to, but are unable to procure, such coverage through ordinary means; or it shall adopt a reasonable plan or plans for the equitable apportionment or sharing among such insurers of windstorm coverage. The commissioner shall promulgate rules which provide a formula for the recovery and repayment of any deferred assessments.

...

2.a. All insurers required to be members of such plan shall participate in its writings, expenses, profits, and losses. Such gross participation shall be in the proportion that the net direct premiums of each member written on property in this state during the preceding calendar year bear to the aggregate net direct premiums of all members of the plan written on property in this state during the preceding calendar year. The commissioner, after review of annual statements, other reports, and any other statistics which he deems necessary, shall certify to the plan the aggregate net direct premiums written on property in this state by all members.

...

6. The plan may authorize the formation of a private nonprofit corporation, a private nonprofit unincorporated association, or a nonprofit mutual company which may be empowered, among other things, to borrow

> money and to accumulate reserves or funds to be used for the payment of insured catastrophe losses. The plan shall incorporate and continue the plan of operation and articles of agreement in effect on the effective date of chapter 76-96, Laws of Florida, to the extent that it is not inconsistent with chapter 76-96, and as subsequently modified consistent with chapter 76-96.
>
> ...
>
> (emphasis added)

36. FWUA was created pursuant to subsection 627.351(2)(b) 2.6., above. The statute requires that insurers licensed to transact property insurance in Florida be members of FWUA. Preferred argues that since amended Article IV extends membership to the entire calendar year during which an insurer was licensed, the emergency rule amendment conflicts with the statute.

37. The statute further requires that members share in the surplus or losses of FWUA in the proportion that the members' net direct premiums during the preceding calendar year bear to the aggregate net direct premiums of all members of the plan written during the preceding calendar year. The statute is silent on the manner of apportioning profits, expenses or losses when an insurer surrenders its license mid-year. Since the statute is silent, the interpretation given by the agency charged with its administration and found in an existing rule, is entitled to deference. General Tel. Co. of Florida v. Florida Public Serv. Comm'n. 446 So.2d 1063 (Fla. 1984).

38. Preferred also argues that DOI had no authority to amend the Articles of Agreement, which it claims is a separate

document from the FWUA Plan of Operation, and is an agreement among insurers who are members of the FWUA.

39. The Articles of Agreement provide in Article XI that they are effective only upon their adoption as rules by the Department of Insurance. Further, subsection 627.351(2)(b)6., Florida Statutes, cited above, provides that the plan of operation (which is adopted by DOI, pursuant to subsection 627.351(2)(b), Florida Statutes) shall incorporate the plan of operation and articles of agreement in effect and as subsequently modified consistent with chapter 76-96, laws of Florida.

40. This legislative guidance has been consistently heeded by DOI since at least 1983, when the "Amended and Restated Plan of Operation and Restated Articles of Agreement" was adopted by reference in Rule 4-49.01, Florida Administrative Code. Later, the rule was amended in 1988 and 1990, and was renumbered as 4J-1.001, Florida Administrative Code. The agency's construction of a statute by rulemaking over an extended period of time without objection by the legislature or by affected parties buttresses the validity of that construction. Jax Liquors, Inc. v. Division of Alcoholic Bev. And Tobacco, 388 So.2d 1306 (Fla. 1st DCA 1980); Department of Admin. V. Nelson, 424 So.2d 852 (Fla. 1st DCA 1983).

41. Sections 120.54(8) and (9), Florida Statutes (1995) provide, in pertinent part:

> (8) ...Pursuant to rule of the Department of State, a rule may incorporate material by

> reference but only as such material exists on the date the rule is adopted. For purposes of such rule, changes in such material shall have no effect with respect to the rule unless the rule is amended to incorporate such material as changed. No rule shall be amended by reference only. Amendments shall set out the amended rule in full in the same manner as required by constitution for laws.
>
> (9)(a) If an agency finds that an immediate danger to the public health, safety, or welfare requires emergency action, the agency may adopt any rule necessitated by the immediate danger by any procedure which is fair under the circumstances and necessary to protect the public interest, provided that:
>
> 1. The procedure provides at least the procedural protection given by other statutes, the Florida Constitution, or the United States Constitution.
>
> 2. The agency takes only that action necessary to protect the public interest under the emergency procedure.
>
> 3. The agency publishes in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. In any event, notice of emergency rules, other than those of educational units or units of government with jurisdiction in only one county or a part thereof, including the full text of the rules, shall be published in the first available issue of the Florida Administrative Weekly and provided to the committee. The agency's findings of immediate danger, necessity, and procedural fairness shall be judicially reviewable.

42. Contrary to Preferred's assertion, rule amendment by reference is legitimate. Section 120.54(8), Florida Statutes specifically provides for such amendment, as long as the adopting rule is itself amended to reference the amended material. See,

also, Department of State Rule 1S-1.005(3), Florida Administrative Code. This process is expressly countenanced for statutory amendments as well. See, State v. J.R.M., 388 So.2d 1227 (Fla. 1980). As addressed above, the evidence established that the amended referenced material did exist at the time the rule notice was published.

43. There is, however, a fatal flaw in the adoption of amendments to Article IV, as found in paragraph 27, above.

44. Touting the amendments to the Plan of Operation and Articles of Agreement as a single package required for closing a complicated and urgent line-of-credit, DOI and FWUA argue that the emergency circumstances were thoroughly described in the notice of rule amendment published on August 18,1995. The evidence does not support this contention. The amendments regarding authority of FWUA and which were essential to the association's closing the deal are severable and distinguishable from the membership amendments in Article IV which were presented to the bank, but were not required by the bank. The membership amendments, vital to a member like Preferred who surrendered its certificate mid-year, were so far removed from the emergency that they were not even mentioned in the notice, much less included in the justification of emergency statement.

45. There may be few emergency situations more sensitive than that those existing in a state prison in the days and hours preceding the execution of a condemned inmate. Yet the

experience of the Florida Department of Corrections in twice attempting to promulgate an emergency rule restricting interviews with prisoners on death row is instructive. In two cases, by two separate appellate courts, those attempts were both determined invalid for lack of proper notice:

> The factual allegations and reasoning set forth in the affidavits [of the prison superintendent filed with the court] may well have provided a sufficient predicate for the promulgation of the emergency rule. However, we note that the statute requires that the agency publish "in writing *at the time of, or prior to*, its action the specific facts and reasons for finding an immediate danger to the public health, safety or welfare and its reasons for concluding that the procedure used is fair under the circumstances." This simply was not done. The conclusionary statement of the Department which was issued at the time the rule was promulgated falls short of what the legislature requires to justify the issuance of an emergency rule. Hence, Emergency Rule 33 ER 79-1 must fall.
> Times Pub. v. Florida Dept. of Corrections, 375 So.2d 304, 306 (Fla. 2nd DCA 1979)

> It may be that immediate dangers of an emergency nature attend interviews, under permanent Rule 33-15.02(1)(c), of two or three condemned prisoners whose execution is imminent; but if so those dangers are not shown by the Department's justification statement which so emphasizes the dangers of handling substantial numbers of prisoners. In emergency rulemaking, especially that emergency rulemaking which effectively cancels rule policy previously adopted after open public debate, Section 120.54(1), an agency is confined to measures which are demonstrably necessary to alleviate the emergency described in its justification statement...
> Times Pub. Co. v. Fla. Dept. of Corrections, 375 So.2d 307, 310 (Fla. 1st DCA 1979)

The First District Court remained mindful of its limited role in scrutinizing the broad discretion of the agency:

> Remembering that our task is not to make prison interview policy but to determine whether the Department has shown an "immediate danger" in continuing its own interview policy as stated in permanent Rule 33-15.02(1)(c), we cannot overlook that the permanent rule is merely suspended for a few days in its application to the great number of death row prisoners, while it is abrogated forever in its application to those who execution warrants are outstanding. (Id.)

46. Preferred has met its burden of proving that the amendments to Article IV, Articles of Agreement pertaining to membership in FWUA, incorporated by reference in 4ER95-1 are an invalid exercise of delegated authority, in contravention of rulemaking requirements of section 120.54(9), Florida Statutes (1995).

Request for Fees and Costs

47. In anticipation of prevailing, Preferred has included in its petition and proposed final order a prayer for award of reasonable costs and attorney's fees pursuant to section 120.595(3), Florida Statutes (1996).

48. This case is in a peculiar or unique procedural posture. The rule that is challenged no longer exists, but is still being applied against the challenger. Section 120.595(3), Florida Statutes, was created through amendments to Chapter 120, which became effective October 1, 1996. Ordinarily a fee statute may not be applied retroactively, as it impacts the respective

rights and responsibilities of the parties and is considered substantive, rather than procedural. Kraft Dairy Group v. Sorge, 634 So.2d 720 (Fla. 1st DCA 1994); See also, Life Care Centers of America, Inc. v. Sawgrass Care Center, Inc. and Agency for Health Care Administration, 21 Fla. L. Weekly D2487 (Fla. 1st DCA opinion filed November 21, 1996). The parties are entitled to brief this and other issues related to application of Section 120.595(3), Florida Statutes (1996) in this case.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is hereby, ORDERED:

The Petition for Administrative Determination of the Invalidity of Emergency Rule 4ER95-1 is GRANTED, to the limited extent that revisions to Article IV, Restated Articles of Agreement, pertaining to membership and incorporated by reference in 4ER95-1 are stricken. Jurisdiction is retained for the determination of Petitioner's entitlement to reasonable costs and attorney's fees pursuant to section 120.595(3), Florida Statutes (1996).

DONE and ORDERED this 21st day of March 1997 in Tallahassee, Leon County, Florida.

MARY CLARK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

(904) 488-9675 SUNCOM 278-9675
Fax Filing (904) 921-6847

Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of March 1997.

ENDNOTES

1/ There were pagination differences, presumable because of the type sizes in the two versions.

2/ The 1996 legislature shifts the burden to the agency to prove the validity of a proposed rule, but leaves intact the challenger's burden as to existing rules. See Sections 120.56(2)(a) and (c), Florida Statutes (1996)

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NOTICE OF RIGHT TO APPEAL

A party who is adversely affected by this final order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of the notice of appeal with the Agency Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.

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[2] The 1996 legislation shifts the burden to the agency to prove the validity of a proposed rule, but leaves intact the challenger's burden as to existing rules. See Sections 120.56(2)(a) and (c), Florida Statutes (1996)

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Case No.: 96-5981RE
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NOTICE OF RIGHT TO JUDICIAL REVIEW

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