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OFFICE OF
INSURANCE REGULATION
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DIVISION OF
ADMINISTRATIVE
HEARINGS

OFFICE OF INSURANCE REGULATION

KEVIN M. MCCARTY
COMMISSIONER

IN THE MATTER OF:

NATIONAL STATES INSURANCE COMPANY

CASE NO: 88014-06

_______________________________________/

FINAL ORDER

THIS CAUSE came on before the undersigned, for consideration and final agency action. On August 16, 2006 National States Insurance Company (hereinafter referred to as "National States" or "Petitioner") submitted a rate filing to the Office of Insurance Regulation (hereinafter referred to as the "Office") in which it requested a rate revision for its Home Health policies. The requested rate increase in that filing was 48.1 percent. The Office denied the requested 48.1 percent increase by issuing a Notice of Intent to Disapprove ("hereinafter referred to as the "NOI") to National States on September 29, 2006.

On November 17, 2006, the Office received Petitioner's Amended Petition for Administrative Hearing. On November 28, 2006, the Amended Petition was forwarded to the Division of Administrative Hearings (hereinafter referred to as "DOAH"), and the matter was heard before the Honorable Don W. Davis, Administrative Law Judge, on April 16 and April 18, 2007 in Tallahassee, Florida.

After consideration of the evidence, arguments, and testimony presented at the hearing, the Administrative Law Judge (hereinafter referred to as "ALJ") issued his Recommended Order on June 15, 2007. The Recommended Order is attached hereto as Exhibit "A". The ALJ

determined that Petitioner's requested rate increase exceeded the legal rate prescribed by Section 627.9407(7)(c), Florida Statutes, and recommended that a Final Order be entered denying National States' requested rate increase.

National States filed exceptions to the ALJ's Recommended Order on July 2, 2007. The Office filed a response to those exceptions on July 11, 2007. Based on a complete review of the record, the Recommended Order and all exceptions and responses thereto, and the relevant statutes, rules, and case law, I find as follows:

EXCEPTIONS TO FINDINGS OF FACT

1. Petitioner's first exception pertains to the reference to Section 627.6245, Florida Statutes, in paragraph 11 of the Recommended Order. Section 627.6245, Florida Statutes, was incorrectly cited in paragraph 11 of the Recommended Order. The correct statutory citation is to Section 627.9407(3)(a), Florida Statutes. Section 627.9407(3)(a) is competent substantial evidence to support the ALJ's Finding of Fact that National States has the option to request that the State of Florida close its entire block of business if its solvency is in jeopardy. This is a finding of fact, not a conclusion of law. The correction of this statutory reference does not materially affect the position of this Final Order, which addresses a specific rate filing, FLR 06-10794. Accordingly, this exception is accepted, but only with regard to the statutory citation.

2. Petitioner excepts to the finding of fact on page 12, paragraph 29, as not being supported by competent substantial evidence. Testimony supports the fact that the New Business Rates were published on September 29, 2006, the same date that the NOI was issued. Petitioner submitted no evidence that the issuance of the NOI preceded publication of the New Business Rates. Notwithstanding Petitioner's failure to sufficiently address any timing concerns which may have felt were at issue, Section 627.9407(7)(c), Florida Statutes, requires the publication of

the new business rate, and outlines what information should be used to calculate the new business rate. The statute does not require publication of the normalization factors used, even though the factors were available. During his deposition, Dan Keating, an actuary employed with the Office, testified that the factors were available to him prior to his disapproving Petitioner's rate filing, and during that deposition, he provided Petitioner with the factors that were used. Mr. Keating's deposition was filed with DOAH as substantive evidence in this case. Mr. Keating also testified during the final hearing that the information regarding the normalization factors was available prior to the disapproval of Petitioner's rate filing. Therefore, competent substantial evidence exists in both deposition and trial transcripts to support the finding of fact that the factors were available and reviewed prior to the disapproval of Petitioner's rate filing. Accordingly, this exception is rejected.

3. Petitioner excepts to the finding of fact on page 13, paragraph 33, as not being supported by competent substantial evidence. Competent substantial evidence exists which supports the ALJ's finding of fact that Petitioner's strategy, as outlined by its actuary, is at variance with the requirements of Rule 69O-149.006(3)(b)23b(IV). The referenced rule requires in pertinent part that "[t]he projected values shall represent the experience that the actuary fully expects to occur." Although the Office stipulated that the sole basis for disapproval of Petitioner's rate filing was the fact that approval would result in a rate filing that exceeded the new business rate, the Petitioner presented evidence relevant to its own durational loss ratio curve, which evidence is the basis for the ALJ's finding of fact that Petitioner's strategy is at variance with the requirements of the above referenced rule. The Petitioner chose to present evidence regarding issues beyond what the Office stated was the sole basis for disapproval. A Chapter 120 proceeding is a hearing de novo intended to formulate final agency action, not to

review action taken earlier and preliminarily. Young v. Department of Community Affairs, 625 So.2d 831, 833 (Fla. 1993) (citing McDonald v. Department of Banking & Fin., 346 So.2d 569, 584 (Fla. 1st DCA 1977) (internal quotations omitted)). Having presented such evidence, the Petitioner opened the door for the ALJ's findings in Paragraph 33. Accordingly, this exception is rejected.

4. Petitioner excepts to the finding of fact on page 13, paragraph 34, as being a conclusion of law instead of a finding of fact. This finding of fact accurately cites Rule 69O-149.006(3)(b)23b(IV), Florida Administrative Code. Accordingly, this exception is rejected.

5. Petitioner excepts to the finding of fact on page 15, paragraph 35, as being vague. Petitioner also excepts to this finding of fact by stating that the Recommended Order accepts some of the actuary's testimony in Paragraphs 31 and 32. Paragraphs 31 and 32 of the Recommended Order do not relate to any substantive issues regarding the rate filing or new business rate. Paragraph 31 discusses the concession by Karl Volkmar, Petitioner's expert actuary, that he did not make any attempt to contact the Office to determine if the new business rate was available:

> 14 BY MS. PATTERSON:
> 15 Q Mr. Volkmar, prior to submitting this National
> 16 States filing, did you ever contact the Office to
> 17 determine what the new business rate for stand-alone home
> 18 health care policies was?
> 19 A No, ma'am.

Tr.p. 96. The testimony referenced above is competent substantial evidence to support the finding of fact in Paragraph 31. Paragraph 32 discusses the testimony offered by Petitioner's actuary and accurately reflects Mr. Volkmar's testimony. (see Tr.p. 60-74) Under Section 120.57(1), Florida Statutes, the Office may not reject the ALJ's findings of fact in this matter "unless the agency first determines from a review of the entire record, and states with

particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." The Office has reviewed the record and has determined that there is competent substantial evidence to support the ALJ's finding that Mr. Volkmar was not credible. Accordingly, this exception is rejected.

EXCEPTIONS TO CONCLUSIONS OF LAW

6. Petitioner excepts to the conclusion of law on page 18, paragraph 48, as conflicting with the holding in Guarantee Trust Life Insurance Company v. Office of Insurance Regulation, DOAH Case No. 06-3305 (June 8, 2005), and as not being supported by any competent substantial evidence. The Office has not issued a Final Order on the Guarantee Trust Recommended Order to which Petitioner refers. Section 120.57(1)(l) states that, "the agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction." A final order issued by an agency, not a recommended order issued by DOAH, is the proper precedent for subsequent agency action. Because the Office has not yet issued a final order on the Guarantee Trust Recommended Order, it remains to be seen if the Office will reject, modify, or adopt the Recommended Order. Additionally, even if the Office adopts the Guarantee Trust Recommended Order in toto, that final order will not alter the conclusions made in this Final Order. The facts outlined in the Guarantee Trust case were sufficiently addressed and reviewed by the ALJ in the DOAH hearing on the instant rate filing. The testimony provided by Mr. Volkmar, Mr. Keating, and Frank Dino, who was also employed as an actuary for the Office, on

the issues is competent substantial evidence to support this conclusion of law. Accordingly, this exception is rejected.

7. Petitioner excepts to the conclusion of law on page 18, paragraph 19, as conflicting with the holding in the Guarantee Trust case, and as not being supported by any competent substantial evidence. For the reasons stated in paragraph 6 of this Final Order, this exception is rejected.

8. Petitioner excepts to the conclusion of law on page 18, paragraph 50, as conflicting with the holding in the Guarantee Trust case, and as not being supported by any competent substantial evidence. For the reasons stated in paragraph 6 of this Final Order, this exception is rejected.

9. Petitioner excepts to the conclusion of law on page 18, paragraph 51, as conflicting with the holding in the Guarantee Trust case. Petitioner also argues that there is no evidence in the record to indicate that the New Business Rate rule was applied to Petitioner with due notice. Testimony supports the fact that the New Business Rates were published on September 29, 2006, the same date that the NOI was issued. Petitioner submitted no evidence that the issuance of the NOI preceded publication of the New Business Rates. Additionally, for the reasons stated in Paragraph 6 of this Final Order, this exception is rejected.

10. Petitioner excepts to the conclusion of law on page 18, paragraph 52, which states:

> National States is not required to continue to do business in Florida at at a loss. Under Section 627.6425, Florida Statutes, National States can request that the state close its entire block of business if its solvency is in jeopardy.

Section 627.6245, Florida Statutes was incorrectly cited in paragraph 52 of the Recommended Order. The correct statutory citation is to Section 627.9407(3)(a), Florida Statutes, which states in pertinent part:

> "[T]he office may authorize nonrenewal for an insurer on a statewide basis on terms and conditions determined to be necessary by the office to protect the interests of the insureds, if the insurer demonstrates that renewal will jeopardize the insurer's solvency or that substantial and unexpected loss experience cannot reasonably be mitigated or remedied."

Section 627.9407(3)(a) supports the conclusion of law in paragraph 52 of the Recommended Order. Accordingly, this exception is accepted, but only with regard to the statutory citation.

11. Petitioner excepts to the conclusion of law on page 19, paragraph 53, as conflicting with the holding in the Guarantee Trust case, and as not being supported by competent substantial evidence. For the reasons stated in paragraph 6 of this Final Order, this exception is rejected.

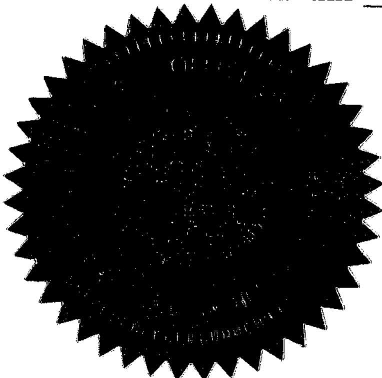
IT IS THEREFORE ORDERED:

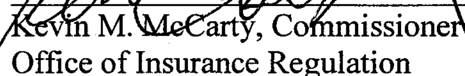
1. The Findings of Fact of the ALJ, except as modified herein, are adopted in full as the Office's Findings of Fact.

2. The Conclusions of Law of the ALJ, except as modified herein, are adopted in full as the Office's Conclusions of Law.

ACCORDINGLY, National States' rate filing FLR 06-10794 submitted on August 16, 2006 for an increase of 48.1 percent in rates is hereby DISAPPROVED.

DONE and ORDERED this 11th day of September, 2007.





Kevin M. McCarty, Commissioner
Office of Insurance Regulation

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of this Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Florida Rules of Appellate Procedure. Review proceedings must be instituted by filing a Notice of Appeal with the General Counsel, acting as Agency Clerk, 200 East Gaines Street, 612 Larson Building, Tallahassee, Florida, 32399-0333 and a copy of the same and filing fee, with the appropriate District Court of Appeal within thirty (30) days of rendition of this Order.

COPIES FURNISHED TO:

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