

211 CMR: DIVISION OF INSURANCE

211 CMR 77.00: PROCEDURES FOR THE CONDUCT OF PROCEEDINGS ON FIXED- AND- ESTABLISHED PRIVATEPASSENGER MOTOR VEHICLEINSURANCE RATES

Section

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77.01: Purpose, Scope and Authority

211 CMR 77.00, promulgated pursuant to M.G.L. c. 175, §§ 113B, 113C and 113L, governs proceedings on fixed-and-established motor vehicle insurance rates, including hearings and investigations to fix and establish fair and reasonable classifications of risks based on accident involvement and adequate, just, reasonable and non-discriminatory premium charges to be used and charged by companies in connection with the issue or execution of motor vehicle policies or bonds which are subject to regulation under M.G.L. c. 175, §§ 113B, 113C and 113L.

77.02: Definitions

As used in 211 CMR 77.00, the following words mean:

Advisory filing. Recommendations concerning rates, premium charges, and classifications of risks filed in accordance with 211 CMR 77.05(4).

Commissioner. The Commissioner of Insurance appointed pursuant to M.G.L. c. 26, § 6, or his or her designee.

Division. The Division of Insurance established pursuant to M.G.L. c. 26, § 1.

Filing. Any document required to be submitted by 211 CMR 77.05(4) and 211 CMR 93.00, Cost and Expense Containment Standards for Motor Vehicle Insurers.

Insurer. An insurance company authorized to write motor vehicle insurance in Massachusetts or a licensed rating organization authorized to act on its behalf.

Intervenor. A person, agency, or organization which is granted permission, pursuant to 211 CMR 77.04(2)(d), to intervene in the whole or any portion of a proceeding.

Motor vehicle insurance. Motor vehicle policies or bonds, both as defined in M.G.L. c. 90, § 34A and 34O and M.G.L. c. 175, §§ 113A, 113C and 113L.

Papers. All written documents filed in a proceeding, including filings, motions, pleadings, briefs, memoranda, and other communications.

Participant. A person, agency, or organization which is granted permission to make a limited appearance as set forth in 211 CMR 77.04(2)(d).

Party. An insurer submitting an advisory filing, statutory intervenors, and intervenors. The Presiding Officer, in his or her discretion, may determine, based on the level of participation allowed, that a participant shall be treated as a party in a proceeding. For purposes of the procedures established by 211 CMR 77.00, the State Rating Bureau shall be considered a party.

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Petitioner. A person, agency, or organization which files a petition pursuant to 211 CMR 77.04(2) for leave to intervene or participate.

Presiding Officer. The Commissioner or a person designated by the Commissioner who conducts proceedings pursuant to 211 CMR 77.00.

Proceeding. A hearing and related procedural matters conducted under 211 CMR 77.00.

Statistical data base. Information gathered by an insurer as required by the Commissioner, including information submitted by the insurer in accordance with the statistical plan as authorized by the Commissioner under M.G.L. c. 175, § 113B.

State Rating Bureau. The State Rating Bureau within the Division, established pursuant to M.G.L. c. 26, § 8E.

Statutory intervenor. A person, agency, or organization, including but not limited to the Attorney General, which has a statutory right to appear in a proceeding conducted pursuant to 211 CMR 77.00.

### 77.03: General Provisions

(1) Filings. All papers shall be filed at the Division's principal office during regular business hours, addressed to the Docket Clerk, Hearings and Appeals. Unless otherwise specified in 211 CMR 77.00, the Presiding Officer shall determine how many copies of papers shall be filed. A party or participant filing papers in a proceeding shall serve a copy thereof on all parties to the proceeding, by hand delivery or by United States mail, postage prepaid, sent to the address of record in the proceeding. In addition, a party or participant filing papers in a proceeding shall notify all participants that papers have been filed. Failure to comply with 211 CMR 77.03(1) shall be grounds for refusal by the Division to accept papers for filing.

(2) Timely Filing. Papers filed in a proceeding must be filed at the Division's principal office within the specified time limits. The date of filing shall be determined as follows:

- (a) Papers hand-delivered during regular business hours shall be deemed filed on that day. Unless otherwise ordered by the Presiding Officer, papers hand-delivered at other times shall be deemed filed on the next regular business day.
- (b) Papers mailed to the Division's principal office shall be deemed filed on the day the Division receives them.

(3) Computation of Time. Computation of a period of time referred to in 211 CMR 77.00 begins with the first day after the date of the initiating act. The last day of the period so computed is included unless it is a day when the principal office of the Division is closed, in which case the period shall run until the end of the next business day. When the time period is five days or fewer, Saturdays, Sundays and legal holidays are excluded from the computation.

(4) Modification of Time. The Presiding Officer may, in his or her discretion for good cause shown, modify a time limit prescribed or allowed by 211 CMR 77.00. A request for an extension shall be made before the expiration of the period originally prescribed or as previously extended.

(5) Signatures. All papers shall be signed by the filing party, its authorized representative or its counsel.

### 77.04: Initiation of Proceedings

(1) Notice of Hearing.

- (a) Contents of notice of hearing. Notices of hearing shall contain:
  1. A reference to the statutory authority under which the proceedings are held;
  2. The date, time, and location of the hearing;
  3. A brief statement of the subject of the hearing; and

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4. A brief statement of the dates and procedures for submission of advisory filings, notices of appearance by statutory intervenors, petitions to appear as intervenors or participants, and notices of appointment of counsel.
- (b) Publication of notice of hearing. In a proceeding to fix and establish rates, the insurer shall publish the hearing notice issued by the Commissioner in at least one newspaper printed in each of the cities and towns prescribed by M.G.L. c. 175, § 113B. In a proceeding on an application to deviate downward from fixed-and-established rates, the insurer shall publish the hearing notice issued by the Commissioner in a newspaper of general circulation in Massachusetts, and shall serve a copy of the notice of hearing on all parties to the proceeding which fixed and established the rates from which a deviation is sought. In all proceedings, the insurer shall file proof of publication within 21 days of publication. The Presiding Officer may require additional evidence of compliance with 211 CMR 77.01(b). The Commissioner shall notify by mail persons who have filed a written request for notice in accordance with 211 CMR 16.08.
- (2) Appearances.
- (a) Statutory Intervenors. No more than 14 days after the publication of the notice of hearing, or within such other time as the hearing notice may designate, statutory intervenors shall submit a notice of intent to appear.
- (b) Intervenors and Participants. No more than ten days after the insurer's filing has been submitted, or within such other time as the hearing notice may designate, any person who wishes to participate in a proceeding, other than the insurer filing under 211 CMR 77.05(1)(a), the State Rating Bureau and statutory intervenors, shall file a petition for leave to intervene or to participate. Each petition shall state the name and address of the petitioner; the manner in which the petitioner is substantially and specifically affected by the proceeding; the contention of the petitioner; the relief sought and the statutory or other authority for the petition; and the nature of the evidence the petitioner will present if the petition is granted, or if specified in the hearing notice, any advisory filing that that person wishes to make if allowed to intervene.
- (c) Responses to Petitions. The insurer, statutory intervenors and the State Rating Bureau may file responses to a petition within seven days after the petition is filed, or within such other time as the Presiding Officer may designate.
- (d) Action on Petitions. The Presiding Officer shall rule on all petitions and may grant a person leave to intervene in the whole or a portion of a proceeding, or may allow a person who is not permitted to intervene to make a limited appearance as a participant by making an oral or written statement of his or her position on the issue, or by other participation as the Presiding Officer may determine. Such grant may be conditioned on terms as the Presiding Officer may determine. No grant of leave to intervene or participate shall be deemed to constitute an expression by the Division that the person allowed to participate is a person who may be aggrieved by a final decision, order or ruling, unless the grant explicitly so states. The Presiding Officer, in his or her discretion, may require petitioners to consolidate their appearances if consolidation will facilitate and expedite the hearing.

77.05: Schedule of Proceedings, Conferences, and Content of Advisory Filings

- (1) Schedule. The Presiding Officer shall determine the dates for submissions of filings; rebuttal evidence and briefs, if any; the beginning and ending dates of cross- and redirect examination; and the dates for any pre-hearing and preliminary conferences. Unless otherwise determined by the Presiding Officer, advisory filings shall be submitted in the following order: insurer, intervenors and statutory intervenors, and the State Rating Bureau.
- The schedule may be altered by the Presiding Officer on his or her own, or upon request by a party upon a showing of good cause. The schedule may provide for separate filings, to be submitted at different times, for different issues or groups of issues specified by the Presiding Officer.
- The schedule and procedures set forth in 211 CMR 77.00 may be modified by the Presiding Officer in proceedings on applications to deviate from the fixed-and-established rates.

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(2) Separate Hearings. The Presiding Officer, in his or her discretion, may direct that certain issues be considered in one or more separate hearing sessions to be conducted according to a schedule set by the Presiding Officer. The Presiding Officer may direct that the sessions proceed concurrently.

(3) Conferences. The Presiding Officer may hold one or more pre-hearing conferences to develop the schedule for the conduct of the proceeding. The Presiding Officer may also direct the parties to confer with the Presiding Officer or each other to consider:

- (a) simplification of issues;
- (b) the possibility of obtaining stipulations or admissions of fact and agreements as to documents;
- (c) a limitation on the number of expert witnesses;
- (d) stipulations as to the qualifications of experts;
- (e) limitations as to the time to be allowed for cross-examination, redirect and recross-examination.
- (f) rulings as to evidentiary disputes; and
- (g) other matters as may aid in the prompt disposition of the proceeding.

After a conference held pursuant to 211 CMR 77.05(3), the Presiding Officer may issue an order regarding the subsequent schedule of the proceeding, which shall control unless modified by the Presiding Officer.

(4) Advisory Filings.

(a) Filing Requirements. Unless otherwise determined by the Presiding Officer, parties shall submit ten copies of all filings in accordance with the schedule determined under 211 CMR 77.05(1). However, in proceedings on applications to deviate downward from fixed-and-established rates, parties shall submit four copies of all filings.

(b) Content of Advisory Filings. Advisory filings shall contain recommendations concerning rates, premium charges, and classifications of risks. Unless otherwise directed by the Presiding Officer, advisory filings shall include all direct testimony, data, statistics, schedules, information, and commentary that the party wishes to present for consideration at the hearing. All direct testimony shall be accompanied by an appropriate written verification from each witness signed under the penalties of perjury. The insurer's advisory filing in a proceeding to fix and establish rates shall include the policy form most recently approved in accordance with M.G.L. c. 175, § 113A. Unless allowed by the Presiding Officer, in his or her discretion and for good cause shown, a party shall be precluded from making additions or amendments to its filing, and from introducing exhibits and raising issues not included in its filing.

(c) Form of Advisory Filings. The Commissioner may prescribe the form of the advisory filing and may make changes to the form from time to time as he or she shall consider proper, expedient or necessary. If a party recommends a change in the form of the advisory filing, it shall file, at the time of the advisory filing, a supplement to that filing specifying the change it is recommending and setting forth all statistics, information, reasons or commentary which it intends to submit in support of a recommendation.

(5) Statistical Data Base. An insurer in a hearing and investigation to fix and establish rates shall submit its statistical data base to the State Rating Bureau and to statutory intervenors as soon as reasonably available, but no later than 50 days after the issuance of the notice of hearing, or as otherwise ordered by the Commissioner.

(6) Relitigation of Facts or Issues; Proposals to Alter Methodologies. The Presiding Officer may rely on previous years' automobile insurance rate decisions as precedent and, in the absence of significant new evidence or other good cause, may preclude the parties from relitigating facts or issues, including methodological issues, decided in previous decisions. All filings shall state with specificity each aspect of a methodology used in the previous year's automobile insurance rate decision which the filing party recommends not be used in the current proceeding. Any such filing shall also state with specificity each recommended methodological alternative. The party's written direct testimony and exhibits shall contain all material, including all data, statistics, schedules and exhibits, which the party wishes to present for consideration at the hearing in support of a recommendation for a change in methodology and a recommended alternative methodology. Such portions of the written direct testimony and exhibits shall be clearly identified. A party who fails to make a filing in accordance with 211 CMR 77.05(6) shall be precluded from recommending or presenting evidence in support of a change in methodology.

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### 77.06: Discovery

(1) Requests for Discovery. The parties are encouraged to engage in voluntary discovery. A party may request another party to produce or make available documents or tangible things, not privileged and not previously supplied, which are in the possession, custody or control of the party to whom the request is made. Such requests may be served on a party after submission of its advisory filing and shall set forth the items to be provided with reasonable particularity. Additional forms of discovery may be allowed at the discretion of the Presiding Officer upon a showing of good cause.

(2) Responses to Discovery. The party receiving the request shall respond within a period of ten days unless the Presiding Officer establishes a different time period. In the event that the time period between the submission of a filing and the commencement of cross-examination on that filing is less than ten days, and the discovery was requested in a timely fashion, the party receiving the discovery request shall respond no later than twenty-four hours prior to the scheduled hearing. The party receiving the request for discovery may, within five days of service of the request, or such other period as the Presiding Officer may prescribe, file objections to the request or move for a protective order. The Presiding Officer may, in his or her discretion, schedule a hearing on the objections or motion. The Presiding Office may issue protective orders to protect a party from annoyance, embarrassment, oppression or undue burden or expense. The Presiding Officer may also order limits on the scope, method, time and place for discovery and provisions for protecting confidential information or documents.

(3) Motions to Compel Discovery. A party may file a motion to compel discovery if a request for documents is not honored, in whole or in part.

### 77.07: Conduct of the Proceeding

(1) Docket. The proceeding shall be assigned a number or numbers on the docket maintained by the Division. Copies of all petitions, briefs, advisory filings, exhibits, written testimony, transcripts, memoranda of findings, orders, decisions, and material submitted in connection with a remand order shall be maintained in the Division's files for a period of not less than seven years.

(2) Presiding Officer. The hearing shall be conducted by the Presiding Officer who shall administer oaths and affirmations, and make all decisions regarding the admission or exclusion of evidence and testimony or other procedural matters which may arise in the course of the hearing.

(3) Ex parte Communication. From the start of a proceeding under 211 CMR 77.00 and until a final decision is rendered, no person who is not employed by the Division shall communicate *ex parte* with respect to the merits of a proceeding with the Commissioner, the Presiding Officer, or any Division employee involved in the decision process for the proceeding in question. A request for information on the status of a proceeding, however, shall not be prohibited by 211 CMR 77.07(3). If an *ex parte* communication is directed to a person in violation of 211 CMR 77.07(3), the person shall immediately inform the Commissioner of the substance of the communication and the circumstances of its receipt. Where a party or his or her agent has violated 211 CMR 77.07(3), the Presiding Officer, within his or her discretion, may decide against that party with prejudice, or may exclude that party from further participation in the proceeding. If the Presiding Officer determines that a person not a party has violated 211 CMR 77.07(3), the Presiding Officer may exclude that person from the hearing.

(4) Conduct of Persons Present. All persons present at the hearing shall conduct themselves in a manner consistent with the standards of decorum commonly observed in the courts of Massachusetts. When these standards are not observed, the Presiding Officer may take action as he or she deems appropriate to maintain order in the hearing, including the exclusion of a disorderly person from a further participation in the proceeding.

(5) Motions. A party may, by motion, request a ruling from the Presiding Officer. The motion shall state the ruling sought and its grounds. The Presiding Officer may require a party to submit a motion in writing and may, in his or her discretion, hear oral argument on the motion before making a decision.

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(6) Oral Statements. A person who has not filed a petition for leave to intervene or participate or whose petition has been denied may request permission to make an unsworn oral statement. Oral statements will be heard at any time within the discretion of the Presiding Officer. The Presiding Officer may limit the amount of time allowed for an oral statement. If the oral statement is irrelevant, immaterial or unduly repetitious, the Presiding Officer may restrict the testimony of the speaker.

(7) Evidence. The Presiding Officer need not observe the rules of evidence observed by the courts of Massachusetts or of the United States, but shall observe the rules of privilege recognized by Massachusetts law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. The Presiding Officer may exclude testimony or evidence which he or she determines is unduly repetitious, will cause an unreasonable delay of the proceeding, or should have been submitted as part of an advisory filing. All evidence, including records, investigative reports and documents in the possession of the Division, which the Presiding Officer desires to use in making a decision, shall be offered and made a part of the record in the proceeding, and no other factual information or evidence shall be considered except as provided in 211 CMR 77.07. Documentary evidence may be submitted in the form of copies or excerpts, or by incorporation by reference.

(8) Written Direct Testimony. All written testimony shall be offered in evidence with the same force and effect as though it were stated orally by the witness, and shall be subject to objections or motions to strike in the same manner as oral testimony. In the event a witness who has given written testimony is unavailable for cross-examination on that testimony at the hearing, such written testimony shall be removed from the record, in whole or in part, unless the Presiding Officer determines that no party would be unduly prejudiced by its inclusion. For the purpose of 211 CMR 77.07, "unavailable" shall include, without limitation, situations in which the witness is absent from the hearing, or unreasonably obstructs cross-examination despite an order from the Presiding Officer.

(9) Cross- and Redirect Examination. Cross- and redirect examination shall be oral. Unless otherwise authorized by the Presiding Officer, cross-examination shall be limited to matters which are within the scope of the direct testimony of the witness. Redirect examination shall be limited to matters which are within the scope of the cross-examination of the witness.

(10) Control of Testimony. The Presiding Officer shall have the right to question witnesses at any time in the course of their testimony. The Presiding Officer may impose reasonable time limits on cross-examination and redirect. Where the Presiding Officer determines that the testimony of a witness is irrelevant, immaterial, or repetitious, he or she may order the witness to limit or omit further testimony on a certain subject or to cease testimony altogether.

(11) Additional Evidence. At any stage of the proceeding the Presiding Officer may call for further evidence or cross-examination upon any issue, and require evidence to be presented or cross-examination to be conducted. In connection with a call for further evidence or cross-examination pursuant to 211 CMR 77.11, the Presiding Officer may in his or her discretion alter the established hearing and filing schedules.

(12) Rebuttal and Surrebuttal. Rebuttal evidence shall be limited to denial of an affirmative fact which another party has endeavored to prove. Surrebuttal evidence will be allowed at the discretion of the Presiding Officer.

(13) Official Notice. The Presiding Officer may take official notice of matters as might be judicially noticed by the courts of the United States or of Massachusetts and, in addition, the Presiding Officer may take notice of general or technical facts within his or her specialized knowledge; provided that the Presiding Officer shall notify all parties of the material so noticed, and shall afford a party an opportunity to contest the facts so noticed. A party requesting that the Presiding Officer take official notice of facts or material must submit a copy of the material with the request.

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(14) Offers of Proof. A party may make an offer of proof after a ruling of the Presiding Officer excluding proposed evidence. The offer of proof shall include a summary consisting of a statement of the substance of the proposed oral testimony and copies of documents. The Presiding Officer may require that the offer of proof be made in writing. All written offers of proof shall be marked for identification.

(15) Stipulations. In the discretion of the Presiding Officer the parties may, by stipulation in writing filed at any stage of the proceeding or orally made at a hearing, agree upon any pertinent fact or issue in the proceeding. In making findings, the Presiding Officer need not be bound by a stipulation, provided, however, that the Presiding Officer shall notify the parties before the end of the proceeding if he or she does not intend to accept a stipulation, and shall give the parties reasonable opportunity to present evidence of any fact or issue covered by such stipulation.

(16) Transcript. The insurer shall engage a qualified stenographer, subject to the approval of the Presiding Officer, officially to record and transcribe a proceeding. The insurer shall pay the stenographer's fees along with the cost of providing two copies of the transcript, in a format prescribed by the Presiding Officer, to the Docket Clerk and one copy to the State Rating Bureau and each statutory intervenor. Other persons may obtain copies of the transcript from the stenographer at cost.

77.08: Oral Argument and Briefs

(1) Oral Argument. When, in the opinion of the Presiding Officer, time permits and the nature of the proceedings, the complexity or importance of the issues of fact or law involved, and the public interest warrant, the Presiding Officer may, either on his or her own or at the request of a party, allow and fix a time for the presentation of oral argument subject to limits of time which are deemed appropriate in the proceeding.

(2) Briefs. Briefs may be filed by a party either before or during the course of the proceeding and shall be filed at any time as the Presiding Officer shall designate. The order of filing briefs, including any reply briefs, will be designated by the Presiding Officer. A party who files a brief shall submit six copies thereof to the Presiding Officer unless a different number is permitted or directed by the Presiding Officer. The Presiding Officer may require parties to file a copy of briefs on computer disk in a format determined by the Presiding Officer. The Presiding Officer may order that briefs be served on participants.

Briefs shall contain:

- (a) a concise statement of the case;
- (b) a clear and specific identification of all evidence relied upon by the filing party, with references to the pages in the record where the evidence appears;
- (c) arguments and supporting authorities;
- (d) a statement of the specific relief requested on each contested issue; and
- (e) other information required by the Presiding Officer.

77.09: Final Decision

The Presiding Officer's final decision shall be in writing, and shall be accompanied by a statement of reasons including a determination of each issue of fact or law necessary to the decision.

77.10: Appeal of the Decision

(1) Appeal. The Presiding Officer shall notify all parties of their right to appeal the decision and of the time within which to appeal.

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(2) Appeal of Decision where the Decision is not Rendered or Approved by the Commissioner. Where the decision is not rendered or approved by the Commissioner, a person aggrieved by a finding, ruling, or decision rendered after the hearing may appeal the finding, order, or decision to the Commissioner who shall review it and may modify, affirm, or reverse the ruling, finding, or decision. A copy of the appeal shall be served on all parties. Upon the docketing of an appeal, the Commissioner shall set a briefing schedule. The brief of the aggrieved party shall state the grounds for the appeal and the remedy requested. The failure to file a brief within the time allotted shall be considered a waiver of the right to appeal. The Commissioner may, in his or her discretion, call all parties to a conference before making a ruling. Where the Commissioner determines after reading the brief of the aggrieved party that the appeal is without substantial merit he or she may dispose of the appeal without requesting briefs from other parties.

REGULATORY AUTHORITY

211 CMR 77.00: M.G.L. c. 175, § 113B.