



COMMONWEALTH OF MASSACHUSETTS
Office of Consumer Affairs and Business Regulation
DIVISION OF INSURANCE

1000 Washington Street, Suite 810 • Boston, MA 02118-6200
(617) 521-7794 • FAX (617) 521-7475
TTY/TDD (617) 521-7490
<http://www.mass.gov/doi>

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

GREGORY BIALECKI
SECRETARY OF HOUSING AND
ECONOMIC DEVELOPMENT

BARBARA ANTHONY
UNDERSECRETARY

JOSEPH G. MURPHY
COMMISSIONER OF INSURANCE

**Opinion, Findings and Decision on Occidental Fire and Casualty Company
of North Carolina's Private Passenger Motor Vehicle Rate Filings
Dated January 11 and March 3, 2010**

Docket No. R2010-03

I. Procedural History

On January 11 and March 3, 2010, the Occidental Fire & Casualty Company of North America ("Occidental"), submitted filings for private passenger motor vehicle ("PPMV") insurance rates to the Commissioner of Insurance ("Commissioner") for his review pursuant to G.L.c. 175E ("c. 175E").¹ In accordance with 211 CMR 79.06(7)(c), Occidental supplemented its filings on February 11² and March 15³, respectively.⁴ On March 23 and March 31, 2010, the Attorney General ("AG"), pursuant to c. 175E § 7, moved for a hearing on Occidental's filings,

¹ The January 11 submission was a rate filing and the March 3 submission was a rule filing. Both types of filings are subject to review under this statute.

² Occidental's February 11 filing contained revised territorial base rates for all classes for Property Damage Liability, Personal Injury Protection and Collision coverages. Occidental also amended Collision Coverage factors applying to vehicle model year and vehicle symbol. Additionally, Occidental introduced rates for the Waiver of Deductible for Collision coverage, inserting a maximum allowable discount of 5% for renewal policies. The AG received revisions for the January 11 filing on February 24.

³ Occidental's March 15 filing was for a \$25 policy fee. The company sought this fee with last year's filing but agreed to defer the implementation of the fee for a year in accordance with an agreement with the AG. The agreement is not part of this record.

alleging that the proposed rates and fees were excessive and unfairly discriminatory. On April 13, the Commissioner issued a hearing notice (“Notice”) scheduling a prehearing conference on April 23, 2010. The Commissioner designated me as the Presiding Officer in this matter.

On April 23, Occidental submitted a letter reserving its rights on three issues: 1) the AG lacked the right to a hearing on the January 11 filing because the Division already placed the submission on file; 2) the AG lacked the right to a hearing on the January 11 filing because she failed to make a request within 20 days of the filing date in accordance with 211 CMR 79.11(3); and 3) the AG had no discovery rights in this proceeding.

I treated Occidental’s first two issues as motions to dismiss and denied both motions on April 30th. Occidental failed to provide its submission to the AG simultaneous with its submission to the Division of Insurance (“Division”) on January 11th, as required by 211 CMR 79.06(3). Occidental failed to meet the service requirements of the regulation.⁵ If Occidental had complied with its service obligation to the AG, its motions may have been meritorious. In the absence of Occidental’s compliance with its obligation under 211 CMR 79.06(3), however, it cannot complain about the timeliness of the AG’s filing of her request for a hearing, the timeframe for which was predicated on timely service of its filing, in accordance with the regulation.

The Commissioner issued an additional Notice of Hearing on May 14, scheduling a hearing for June 3. The May 14 Notice stated that the hearing would address whether Occidental’s rates are excessive in violation of G.L.c. 175A and c.175E, as is alleged by the AG. Specifically, the issues to be considered at the hearing, at the request of the AG, were whether:

⁴ When a rate filing is incomplete, the Division may request additional information.

⁵ I noted that it would be contrary to the principles of equity to allow Occidental to miss its first deadline by 44 days and yet to penalize the AG for missing a deadline by seven days.

(1) Occidental failed to provide data, information or other support for its requested 10.3 percent rate increase, which appears to be nearly identical to the 2009 rate filed by CAR; (2) Occidental violated a 45-day waiting period allegedly prescribed by statute by implementing its rates on February 12, 2010; and (3) Occidental imposed an excessive policy fee in the amount of \$25 that allegedly lacked support or justification. The hearing on the merits of the AG’s claims occurred on June 3. Jeffery L. Ellis, Vice President of Occidental Fire & Casualty Company, testified on behalf of Occidental. The AG offered no witness testimony.

II. Standard of Review and Burden of Proof

A. Standard of Review

G.L.c. 175E § 4 mandates that “[r]ates shall not be excessive or inadequate, as herein defined, nor shall they be unfairly discriminatory.” Further, it provides that “[n]o rate shall be held to be excessive unless [it] is unreasonably high for the insurance provided.” The Commissioner may not disapprove rates if they fall within a range of reasonableness, and otherwise satisfy the requirements of the general laws. *Attorney General v. Commissioner of Ins.*, 450 Mass. 311 (2008).

B. Burden of Proof

G.L.c. 175E, §7, authorizes the AG to request a hearing on a rate filing for PPMV insurance. The rate filer, however, has the burden of proving that its filing complies with G.L. c. 175E, G.L. c. 175A, and 211 CMR 79.13(11). Challenges to particular aspects of the rate filing are insufficient, *per se*, to demonstrate that an overall rate does not meet statutory standards.

The Commissioner reviews the proposed overall filed rates as a whole to determine whether a company’s proposed rates are excessive for the insurance provided. He considers whether the company generated the rates and rating plans using sound actuarial methods. 211

CMR 79.05(5). He also considers whether a reasonable degree of competition exists in the market. M.G. L. c. 175E §4(a).

III. Substantive Issues

The AG alleges that Occidental's rate filing creates excessive and unfairly discriminatory rates on three grounds. Specifically, the AG asserts that Occidental: 1) failed to provide data, information or other support for its requested 10.3% rate increase, which appears nearly identical to the 2009 rates filed by Commonwealth Automobile Reinsurers ("CAR")⁶ for use in the assigned risk plan, the MAIP; 2) implemented its filed rates on February 12, 2010, before the expiration of a 45-day waiting period allegedly prescribed by statute; and 3) imposed a policy issuance fee in the amount of \$25 per policy without support or justification.

A. Occidental's 10.3% rate increase

The AG alleges that Occidental's 10.3% rate increase was filed without supporting data or actuarial support and, therefore, is unreasonable and excessive. According to the AG, Occidental's use of CAR's MAIP rate as a basis for its rate, is unreasonable and leads to an excessive rate. Indeed, she argues that Occidental's rates may even be higher than the MAIP rate after Occidental imposes all of its additional fees.⁷ These higher rates, she argues, result in contravening the legislative intent behind the "Lane Bolling" amendment codified in G.L. c 175,

⁶ Pursuant to G.L. 175, § 113H, Commonwealth Automobile Reinsurers administers the Massachusetts Automobile Insurance Plan (MAIP). Every company licensed to write motor vehicle insurance is required to become a member of CAR. A member is appointed as an Assigned Risk Company (ARC), pursuant to the MAIP Rules of Operation, to issue PPMV insurance policies assigned through the MAIP.

⁷ In addition to the policy fee and a 25 percent surcharge fee, Occidental charges a \$10 fee for any installment payment that is more than six days late, a \$15 fee for payments returned for insufficient funds, and a \$25 reinstatement policy fee.

Section 113H.⁸ To permit a company to charge a risk a higher rate in the voluntary market than it would charge the same risk in the residual market “negate[s] the legislative consumer protections granted in Lane Bolling,” according to the AG.

Mr. Ellis, who is not an actuary, testified that he personally reviewed the MAIP rates to determine if they were actuarially sound for Occidental. He noted that Occidental uses actuaries periodically, but that they did not use an actuary in this filing. Nonetheless, he testified that the use of rates similar to those in the MAIP was a reasonable business decision based on the similarity between the risks written in the MAIP and the risks writing by Occidental.

Mr. Ellis characterized Occidental as a nonstandard automobile insurance writer⁹ that writes business solely through the A-Affordable Insurance Agency, Inc. A-Affordable Insurance Agency is a licensed personal lines insurance agency with 10 offices serving primarily Central and Eastern Massachusetts. He testified that Occidental’s business tends to be higher-risk, thereby justifying Occidental’s rates that are similar but slightly lower than the general base MAIP rates, although he could not be certain that this was so after a number of fees are assessed.¹⁰ Occidental argues that its voluntary writing of higher risks, which otherwise might be placed in the residual market, also provides public policy support for its rates as the availability of Occidental’s voluntary insurance helps to limit the size of the MAIP.

⁸ The “Lane Bolling” amendment provides that rates charged in the residual market shall not exceed the premium rates that would be charged by each risk’s servicing carrier for that risk if such risk were written by the Servicing Carrier in the voluntary market.

⁹ Nonstandard insurance is provided to individuals who do not qualify for standard insurance coverage because of driving record, payment history, age, or other factors that would characterize the individual as high risk. In his pre-filed testimony, Mr. Ellis notes that Occidental concentrates its marketing efforts on nonstandard personal automobile markets across the country.

¹⁰ Mr. Ellis was not positive as to whether Occidental’s rates exceeded the base MAIP rates after accounting for the \$25 policy fee and the 25 percent surcharge for unacceptable risks.

The AG argues, in contrast, that Occidental does not market insurance only to higher risk drivers but to all consumers in Massachusetts. The AG maintains that Occidental's agent, A-Affordable, does not limit its business exclusively to high-risks. Therefore, the AG asserts that Occidental's rates for any of its lower-risk business may be excessive because the rates are derived from MAIP rates which are used only for higher risk business.

Discussion and Conclusion

The AG places great importance on the fact that Occidental did not provide actuarial support for its rate filings. Lack of actuarial support does not constitute *per se* evidence that a rate is unreasonable or excessive. The AG fails to recognize that Occidental is relatively new to the automobile insurance market in Massachusetts and has insufficient historical data to permit a meaningful actuarial analysis of rates. The use of an actuary in these circumstances is of limited value. Moreover, Massachusetts PPMV is a newly competitive market and the underlying data for this market, particularly in the case of a new entrant, remains immature. Occidental, therefore, relied on the rates submitted by CAR, previously placed on file by the Division, as added support for its filing.

The Division's PPMV regulation, in relevant part, instructs insurers to use "any sound actuarial method in determining rates and rate plans." 211 CMR 79.05(5). It does not impose a specific methodology to determine sound actuarial practices, and permits the use of judgment in determining a rate, which Occidental used in this instance. 211 CMR 79.05 (5).¹¹ As

¹¹ 211 CMR 79.05(5) provides that consideration shall be given, to the extent applicable, to past and prospective loss experience within and outside Massachusetts, to catastrophe hazards, to a reasonable rate of return on capital after provision for investment income, to past and prospective expenses both country-wide and those specially applicable to Massachusetts, and to all other factors, including judgment factors, deemed relevant within and outside Massachusetts.

Occidental's typical customer is similar to the risk that is ordinarily written in the MAIP, its use of the MAIP rate as a benchmark upon which to base its rates is not unreasonable.

Public policy considerations cannot be overlooked as well. Occidental's presence in Massachusetts contributes to a major policy goal, which is to limit the number of risks involuntarily assigned through the MAIP. Occidental insures higher risk drivers that many other companies refuse to write voluntarily. Nonstandard insurers, such as Occidental, reduce the MAIP population by providing voluntary insurance to many high-risk customers. If a customer, high risk or not, receives a rate quote from Occidental that she believes is too pricey, that customer is free to shop for insurance from other insurers in the voluntary market to determine if she can obtain insurance at a lower rate.

The AG's interpretation and application of the Lane Bolling Amendment to the facts of this case is also misplaced. The Lane Bolling Amendment is codified within G.L. c. 175, Section 113H, the statute regulating the PPMV residual market. It provides protections to risks in the residual market but has absolutely no application or effect within the voluntary market and is not germane to Occidental's rate filing or this review.

Based on all of the above, on this record, I find that Occidental has met its burden of demonstrating that its 10.3% rate increase is not excessive.

B. Implementation of Occidental's rates within 45-days of the filing

Section 7 of M.G.L. c. 175E states that "every insurer or rating organization authorized to file on behalf of such insurer shall file with the Commissioner or his designated representative every manual of its classifications, rules and rates, rating plans and modifications of any of the foregoing not less than forty-five days before the effective date thereof."¹² The Division's

¹² According to the statute, the 45-day period begins when the insurer initially files with the Division.

respective regulatory provision, 211 CMR 79.06 (1)(a), tracks the statutory language in substance. The AG interprets this provision to mandate a waiting period of 45 days from the date of filing to the date that the insurer can offer its product in the marketplace, regardless of whether the Division completes its review prior to such date. She also contends that the Division does not have the authority to “waive” such a statutory requirement or permit insurers to disregard it even if, as maintained by Occidental, the Division has done so on prior occasions. Moreover, placing the rate “on file” indicates only that the Division has completed its review of the filing, not that it has approved the rate for immediate use. Finally, she asserts in her March 23 letter that permitting a rate to go into effect prior to the expiration of the 45 days does not provide regulators with sufficient time to review the rate. Relief for this violation, she maintains, should be in the form of a refund to all policyholders who obtained insurance during this 45-day period.

Occidental argues, in substance, that the 45-day period is not a mandatory waiting period, but merely controls the proposed effective date of a rate contained in a rate filing. The Division, according to Occidental, may amend such date if it chooses to do so. Occidental also contends that the Division has permitted this practice for many of Occidental’s competitors. It supports this contention with an exhibit documenting that on 23 separate occasions, PPMV auto filings have gone into effect fewer than 45 days after the filing date. Occidental, it argues, also should be the beneficiary of such flexibility, particularly since the Division has shown flexibility to the AG in this proceeding with regard to two other issues involving statutory interpretations.

Discussion and Conclusion

“The Commissioner has traditionally been vested with broad discretion and authority by the Legislature in the area of motor vehicle insurance rate regulation.” *Metropolitan Property*

and Casualty v. Commissioner of Ins., 382 Mass. 514, 517 (1981). The AG’s characterization of the 45-day period as a mandatory “waiting period” is not supported by the plain language of the statute. G.L.c. 175E, § 7 explicitly states that:

Every insurer or rating organization authorized to file on behalf of such insurer shall file with the commissioner ... rating plans ... not less than forty-five days before the effective date therefore.

Nowhere does the statute mandate a waiting period of any length of time. The statutory language “not less than” contemplates that the insurer could, if it so chose, file rates *more than* 45 days prior to the proposed effective dates. This would extend the so-called waiting period beyond 45 days. If the Legislature had intended a mandatory 45-day waiting period not only would it have said so in plain terms, (*e.g.* “insurers shall file with the commissioner rating plans 45 day before the effective date”) it would not have left the insurer with the option to extend this period beyond 45 days.

The 45-day period is a filing requirement *for the benefit of the regulator*. It is intended to allow the regulator ample time, within limitation, to conduct a meaningful review. Although the AG claims in her March 23rd letter to the Commissioner that a shorter period of time does not permit the regulator sufficient time to review the rate, the Commissioner and his staff are in the best position to determine whether they need a full 45 days to review a rate filing under c. 175E, Sec. 7. If the Division staff is able to complete its review prior to such deadline, there is nothing to prevent it from permitting the insurer to place the rate in the marketplace earlier than the original effective date. There can be no harm to consumers from doing so after the Division has determined that the rate is not “excessive, inadequate or unfairly discriminatory” and the rate has been placed “on file.” The rate has not been disapproved and consumers should have the benefit

of an additional product from which to choose.¹³

Further evidence that the 45 day period within G.L.c. 175E, § 7, is a filing requirement rather than a mandatory waiting period, can be found in G.L. c. 175A. Section 6 of chapter 175A is a parallel provision to Section 7 of chapter 175E. It states that: Every insurer shall file with the commissioner ... every rating plan ... at least fifteen days prior to the proposed effective date... The commissioner may by order delay the effective date for not more than thirty additional days in any case where he determines such delay is needed to properly examine the filing and any supporting information filed as requested or to permit a hearing hereon.

Chapter 175A preceded chapter 175E and was the initial statutory provision regarding rate filings for all kinds of casualty insurance, including motor vehicle insurance. This provision contemplates a 15-day review period unless the Commissioner needs more time to review the rate filing, in which case the effective date may be extended an additional 30 days. This brings the maximum review period to 45 days, as is the case under the successor provision in Section 7 of chapter 175E. As with chapter 175E, there is no specific “waiting period” and the underlying purpose of the time restrictions are directly related to the regulator’s need to “properly examine the filing.” It is the regulator alone who determines whether additional time is necessary or, in the alternative, whether the rate filing may be reviewed expeditiously and placed into the marketplace without delay.¹⁴ Indeed, as Occidental maintains, the Commissioner has the utmost flexibility in this regard provided he does not exceed the maximum review period of 45 days. In this instance, the Division implicitly authorized Occidental to offer this product at the subject rate after the Division placed the rate “on file”.¹⁵

¹³ New rates are not always higher. The AG’s proposed scenario also would make consumers wait a full 45 days before a rate decrease could take effect.

¹⁴ We note that there may be limits to how quickly a rate filing may be offered in the marketplace notwithstanding how quickly the Division may complete its review of such filing. If, for example, a rate were placed “on file” prior to the expiration of the AG’s time to request a hearing on a rate filing under 211 CMR 79.11(3), *e.g.* within 20 days from the filing date, the insurer would not be permitted to implement its rate prior to the expiration of this period so as not to interfere with the AG’s rights to a hearing under the corresponding statute and regulation.

C. Occidental's \$25 Policy issuance fee

The AG argues that Occidental's \$25 policy fee is excessive because an actuary from Occidental did not review it to determine whether it was actuarially sound. The AG further contests the reasonableness of this fee because it is based on the MAIP rate and Occidental failed to determine if the costs associated with paper, postage, and transactions included in this "policy fee" were already accounted for in such rate, thereby potentially rendering it a duplicative fee. The AG also asserts that there is no detailed cost justification for this fee in Occidental's filing.

Mr. Ellis testified that the policy fee consists of postage, endorsements,¹⁶ transactions per term, supplies, and documents.¹⁷ Occidental argues that the \$25 policy fee is not excessive because it charges the same fee in other competitive states¹⁸ and that an internal cost study determined that a reasonable estimate of per policy costs was about \$25. Occidental also stresses that its agreement with the AG not to charge the policy fee during the first year of Occidental's writing business in Massachusetts expired and that it may now charge this fee.

Discussion and Conclusion

As discussed above, Occidental is new to the automobile insurance market in Massachusetts, and it does not have sufficient information to provide an actuarial analysis of its rates or the individual components thereof. Indeed, the Division's regulation does not impose a

¹⁵ I need not reach the AG's assertion that the Division "does not have the authority to 'waive' a statutory requirement or to permit insurers to violate a statutory mandate" based on the above finding that the respective statutory provision does not contain an actual mandatory waiting period as asserted by the AG. I also need not comment on Occidental's argument that it should be allowed such flexibility since others have been afforded such treatment as we reach the same result for different reasons.

¹⁶ Mr. Ellis explained that Occidental uses the term 'endorsements' to reflect any change in the policy rather than standard endorsements that would be on file at the Division of Insurance.

¹⁷ The Policy fee expense explanation outlines the costs for each item.

¹⁸ Occidental claims that fees charged in other competitive states provide a measure of reasonability for fees in Massachusetts. Those states include Arizona, Florida, Minnesota, North Dakota, and South Dakota.

specific methodology to determine sound actuarial practices and permits the use of judgment in determining rates. 211 CMR 79.05. Occidental provided a cost justification for this fee by noting that the fee is based on the actual costs of providing certain documents in the production of an auto policy. Furthermore, the Division's regulation does not even require a detailed cost justification for items contained in the insurers' filings. For these reasons, I do not find the \$25 dollar policy fee excessive.

IV. Conclusion

Occidental's rates are not excessive or unreasonable for the type of product that it offers. Indeed, Occidental is providing a service by offering options to drivers who might otherwise be unable to buy insurance in the voluntary market. These drivers might otherwise be placed in the MAIP, increasing the size of the residual market and eliminating all meaningful choice for these drivers. In managed competition that is not a desirable result. Occidental has demonstrated that its rates are reasonable for the benefits provided and that they are not excessive.

DATED: August 25, 2010

Elisabeth A. Ditomassi
Presiding Officer

Affirmed this 25th day of August 2010

Joseph G. Murphy
Commissioner of Insurance

