STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-09-29

ANTHEM HEALTH PLANS OF MAINE, INC.,
d/b/a ANTHEM BLUE CROSS AND BLUE SHIELD

Petitioner

v.

SUPERINTENDENT OF INSURANCE, *ET AL.*

Respondents

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BRIEF OF RESPONDENT
SUPERINTENDENT OF INSURANCE
IN OPPOSITION TO APPEAL

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INTRODUCTION

NOW COMES Respondent, Superintendent of Insurance (the "Superintendent"), by and through her undersigned counsel, and opposes the appeal brought by Petitioner, Anthem Health Plans of Maine Inc., d/b/a Anthem Blue Cross and Blue Shield ("Anthem") in this matter. By her Decision and Order dated May 18, 2009, the Superintendent denied Anthem's proposed average rate increase request of 18.5% for its individual health insurance products as excessive and unfairly discriminatory, but found that a revised filing with an average increase of 10.9% would result in rates that would not be excessive, inadequate, or unfairly discriminatory. The Superintendent's findings and conclusions are in conformance with insurance law, supported by the whole record, and do not violate Anthem's Constitutional rights. There is nothing in the Maine Insurance Code that supports Anthem's argument that the rates, as approved, are in any way "inadequate," or that the Superintendent is required by law to provide affirmatively for a profit margin in Anthem's rates this year. Moreover, under the circumstances of this case, it is entirely appropriate for the Superintendent to look at both the financial health of Anthem's individual line of insurance and the overall financial soundness of the Company in undertaking her rate review. The Superintendent's Decision and Order should be affirmed by the Court.

STATEMENT OF FACTS

Anthem Health Plans of Maine, Inc. is a Maine-domiciled insurance company licensed by the Superintendent to sell health insurance products in

the State.[1] The Company is also a licensee of the Blue Cross and Blue Shield Association and markets its products under the Blue Cross and Blue Shield trade name. (Record Binder 5, page 1026; hereinafter "R.B. ___, p. ___".)

Anthem and its predecessor Blue Cross Blue Shield plan have been in operation in this State for over 69 years.[2] Anthem offers traditional indemnity products and a mix of managed care products, including health maintenance organization ("HMO"), preferred provider arrangement ("PPA"), and point of service ("POS") plans to groups and individuals in Maine. (R.B. 5, p. 1026.) Anthem also provides administrative services, such as claims processing, underwriting, provider network access, and medical cost management to certain customers under self-insured agreements. (*Id.*) The premium from Anthem's individual insurance business represents only about 6.5% of its total revenue from all operations. (*See* R.B. 5, p. 1023; R.B. 1, p. 232.) The vast majority of Anthem's revenue derives from premiums on group policies, the rates for which are not subject to approval by the Superintendent.

Anthem is a wholly-owned subsidiary of ATH Holding Company, LLC ("ATH Holding"). (R.B. 5, p. 1026.) ATH Holding is a wholly-owned subsidiary

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[1] Anthem is designated by Maine License Number LHD70566 and NAIC Code 52618. (*See* State of Maine, Agency License Management System (ALMS) online service at http://pfr.informe.org/almsonline/almsquery/SearchCompany.aspx.)

[2] Maine's original Blue Cross Blue Shield plan, known formally as Associated Hospital Service of Maine (AHS), was a nonprofit corporation that had been a licensed nonprofit hospital and medical service organization in Maine since 1939. In 1999, Anthem's parent corporation agreed to buy the business of AHS and to continue operating the business through a new Maine for-profit stock company under the Blue Cross Blue Shield name and trademark. The Superintendent approved the transaction, which was also approved by the Attorney General as required by law. *See* Superintendent Decision, Docket No. INS-99-14 (Consolidated), May 25, 2000.

of WellPoint, Inc., a publicly traded company and the largest health benefits company in the United States in terms of membership, serving approximately 34.8 million members as of December 31, 2007. (*Id.*) Together with Anthem, there are approximately 45 health insurance subsidiaries of WellPoint with total annual net income (profit) averaging nearly $2.6 billion throughout the five-year period 2004-2008. (*Id.*, p. 1025-A.)

Anthem is a profitable company. Anthem's total revenue from all operations for the year ended December 31, 2007, was over $1 billion, and its net income, before federal income taxes ("FIT"), was over $100 million – a profit of nearly 9.5%. (R.B. 5, p. 1029.) Anthem's five-year historical revenue, income, and profit are as follows:

Anthem (Maine) Total Revenue; Net Income (profit); Profit Percentage (All Operations)					
	2008	2007	2006	2005	2004
Total revenue	$997,281,173	$1,075,899,931	$1,066,876,525	$1,033,446,098	$901,944,887
Net income (profit), before FIT	$74,711,468	$100,900,628	$60,355,976	$55,387,254	$60,019,107
Profit (before FIT)	7.5%	9.4%	5.7%	5.4%	6.7%

(*Id.*, p. 1023.)[3]

A.M. Best Company rated Anthem "A" (Excellent) as of December 31, 2007, reflecting the agency's opinion as to Anthem's financial strength, operating performance, and ability to meet its claim obligations. (R.B. 5, p. 1029.) An "A" rating is assigned to companies that have, in A.M. Best's

[3] The "net income (profit), before FIT" amount is derived by adding the figures from lines 9, 10, and 11 on p. 1023.

opinion, an excellent ability to meet their ongoing insurance commitments. (*See* A.M. Best rating guide at http://www.ambest.com/ratings/guide.pdf.)

Anthem overwhelmingly surpassed other regulatory benchmarks of financial strength, further indicative of the Company's sound financial position. (R.B. 5, p. 1029.) One regulatory benchmark of financial soundness is an insurer's capital position relative to the risk-based capital ("RBC") standards established by the National Association of Insurance Commissioners ("NAIC"). RBC is measured by comparing an insurer's total adjusted capital ("TAC") to its authorized control level ("ACL"), which is the minimum required capital level that an insurer must maintain in order to avoid being subject to receivership at the discretion of the Superintendent.[4] (R.B. 5, p. 1029.)

Under Maine law, Anthem is required to maintain working capital at no less than 250% of the authorized control level RBC before certain regulatory events are triggered. *See* 24-A M.R.S. §§ 6451(8), 6453 (2008). Anthem's ACL was $27.9 million as of December 31, 2007, and $22.9 million as of December 31, 2006, corresponding to minimum capital requirements of $69.8 million and $57.3 million respectively. (R.B. 5, p. 1029.) In each of these years Anthem far exceeded Maine's minimum requirement. (*See* table below showing total adjusted capital levels.) Anthem's total adjusted capital as of December 31, 2007 and 2006, respectively, was $252.1 million and $215.3 million. (*Id.*) These figures resulted in RBC ratios of 904% and 940%, respectively, calculated by dividing the TAC by the ACL. (*Id.*) Anthem's strong risk-based

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[4] *See* Chapter 79, Risk-Based Capital Standards (24-A M.R.S. §§ 6451 – 6461 (2008)).

capital positions for 2006 and 2007 are comparable in magnitude to its five-year historical data, demonstrated as follows:

Anthem (Maine) Risk-based Capital Ratio (All operations)					
	2008	2007	2006	2005	2004
Total adjusted capital (TAC)	$227,972,562	$252,058,578	$215,295,519	$214,760,793	$177,186,888
Authorized control level RBC (ACL)	$28,685,681	$27,919,511	$22,933,421	$20,418,924	$20,787,270
TAC to ACL Ratio	794.7%	902.8%	938.8%	1051.8%	852.4%

(*Id.*, p. 1023.) The table shows that for the five-year period 2004-2008 Anthem held capital at levels that were on average nine times (over 900%) greater than the NAIC's authorized control level threshold. As explained by the AG's actuarial expert, in general "good sound financial companies are running around between 5.0 and 6.0 [a 500-600% TAC-to-RBC ratio]." (R.B. 6, p. 1578.) As demonstrated by Anthem's TAC-to-RBC ratio average of over 900% from 2004 through 2008, the Company is doing very well and is much more than financially sound. (*Id.*)

Given Anthem's extremely sound financial position, in 2008 Anthem paid dividends to WellPoint, through ATH Holding, in excess of $75 million. (R.B. 5, pp. 1024, 1029.) For the three-year period 2006-2008 Anthem paid nearly $152 million in dividends to WellPoint based on the Company's Maine operations, in the following annual amounts:

Anthem (Maine) Annual Dividends Paid			
	2008	2007	2006
Dividend	$75,700,000	$40,400,000	$35,600,000

(*Id.*)

In 2006, Anthem executive compensation in Maine for its nine highest-paid employees totaled over $4.3 million, averaging almost $500 thousand per executive. (R.B. 6, p. 1284.) This included total base salaries of nearly $1.6 million, bonuses in excess of $835 thousand, and all other compensation of over $1.9 million (which may include payouts under multi-year long term incentive plans, sales incentives, severance, and the exercise of stock options granted in prior years.) (*Id.*)[5] During 2006-2008, the three-year average executive compensation for Anthem's top nine employees remained at nearly $500,000. (*See* Anthem's 2006-2008 Supplemental Compensation Exhibits, which are publicly available from the Bureau of Insurance.)

Historically, Anthem's individual line of insurance in Maine has also been profitable. For the nine years that Anthem has been in operation in Maine (2000-2008),[6] the pre-tax operating gain – or profit – from its individual line of insurance in the State totaled approximately $17.4 million, representing a weighted average of 3.2% of total revenue. (R.B. 1, p. 232.)[7] Losses in this nine-year period occurred only in 2005 and 2006, with gains in all of the other seven years. (*Id.*) Pre-tax gain in 2007 was 5.3%, or nearly $3.6 million profit; and for 2008 was 2.8%, or nearly $1.8 million profit; totaling approximately

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[5] The sworn testimony relied on Anthem's 2006 Supplemental Compensation Exhibit, which is on file with the Superintendent as a public record.

[6] Anthem operated the Maine Blue Cross and Blue Shield plan for only part of the year 2000. (R.B. 2, p. 311, n. 3.)

[7] The Superintendent's Decision and Order inadvertently calculated the Anthem Exhibit IX data to derive slightly under $16 million in profit, which was a mathematical mistake. (R.B. 2, p. 311; *compare to* Anthem Exhibit IX at R.B. 1, p. 232.)

$5.4 million of profit from Maine's individual insurance consumers in the last two years.[8] (*Id.*)

On December 22, 2008, Anthem filed a rate increase request with the Superintendent for its individual health insurance policies: the HealthChoice, HealthChoice Standard, HealthChoice Basic, and Lumenos Consumer Directed Health Plan products. (R.B. 1, pp. 1-89.) HealthChoice is an individual PPA product with 13 benefit options varying from $150-to-$1000 deductible plans with $1,000 co-insurance; $2,000 and $4,000 deductible plans with $1,000 co-insurance; and $2,250, $5,000, $10,000, and $15,000 deductible plans. (*Id.*, p. 234.) HealthChoice Standard (Standard Plan A) and HealthChoice Basic (Standard Plan B) are the standardized health plans that must be offered by all carriers providing individual coverage (often referred to as "mandated plans").[9] (*Id.*, p. 184.) The Lumenos plans are five individual PPA products with three distinct health care account funding options and $2,500, $5,000, and $10,000 deductibles. (*Id.*, p. 185.) As of the quarter ended September 2008, nearly 90% of Anthem's individual policyholders held $5,000, $10,000, or $15,000

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[8] Anthem's initial rate filing made on December 22, 2008, showed a pre-tax gain of 5.0% for the first 10 months of 2008, with projected 2008 pre-tax gain at 2.0% based on data through October 2008. (R.B. 1, pp. 67.) Anthem's first revised rate filing made on January 22, 2009, showed 2008 pre-tax gain at 2.8% based on data through December 2008. (*Id.*, p. 144.) Anthem's second revised filing made on March 6, 2009, did not update the 2008 pre-tax gain determination with more current data, but left it unchanged at 2.8% (still based on data through December 2008). (*Id.*, p. 232.) Note that claims incurred in a given month may not be reported or paid until a later month. Therefore, claims based on data through December 2008 include an estimate of the unpaid portion. When a filing is revised, this estimate is sometimes updated to reflect more recent data, but in this case it was not.

[9] The coverage requirements for "mandated plans" (Standard Plan A and Standard Plan B) are set forth in Bureau of Insurance Rule Chapter 750, Standardized Health Plans. "Non-mandated plans" are any additional plans the insurer chooses to offer.

deductible plans, with nearly 30% holding the $15,000 deductible plan. (*Id.*, p. 253.)

Anthem initially proposed an average rate increase of 14.5% for its individual insurance products effective May 1, 2009. (R.B. 1, p. 38.) The premium increases varied depending on deductible level and type of contract. (*Id.*, pp. 11, 42-55.) When it became evident that a rate increase could not be implemented by the desired May 1, 2009, implementation date, Anthem revised its filing on January 22, 2009, proposing an average rate increase of 18.1% and a new implementation date of July 1, 2009. (*Id.*, pp. 95-182.) At the time of submitting its pre-filed testimony and exhibits on March 6, 2009, Anthem further revised its actuarial analysis, resulting in a requested average rate increase of 18.5%. (*Id.*, pp. 183-253.) For the non-mandated HealthChoice options the range of increases would have been 8.7% to 24.5%, with an average of 18.7%. (*Id.*, pp. 186, 207-220.) For the mandated HealthChoice options the range of increases would have been 9.0% to 9.7%, with an average of 9.2%. (*Id.*) For the Lumenos plan the range of increases would have been 8.9% to 38.4%, with an average of 30.2%. (*Id.*) These increases reflect changes in the rate for individuals remaining in their current age bands. (*Id.*, p. 186.) Any HealthChoice or Lumenos member entering a new age band (for example, turning 30 or turning 55) would incur an additional rate increase from between 3.1% to 25.0%, depending upon the age band and the product. (*Id.*) Anthem's filing also included a proposed rate increase of 58.2% for its Preventive Care and Supplemental Care Accident (PCSA) rider. (*Id.*, pp. 200-201.)

As of December 2008, HealthChoice and Lumenos enrollment included approximately 12,000 policyholders, with over one-third of the policies, nearly 4,500, also holding the PCSA rider (as of October 31, 2008). (R.B. 1, pp. 186, 236.) The annualized premium payments to Anthem from these policyholders were approximately $65 million based on current 2008 enrollment and rates (prior to any rate change). (*Id.*, p. 220.) By its rate filing Anthem sought an additional $10.5 million in annual insurance premium payments, for a total of approximately $75.5 million for the 12-month rating period July 1, 2009 – June 30, 2010. (*Id.*) Anthem's estimate of total annual income from proposed rates and current enrollment would have been approximately $77 million if not for the projected continued enrollment shift by consumers to plans with higher cost sharing, which are less expensive in terms of premium costs (though the overall cost may be higher depending on how much health care the consumer needs). (*Id.*) Under these circumstances, Maine consumers would have paid an additional $12 million in annual premium for the same level of benefits. (*Id.*)

Of Anthem's approximately 12,000 individual Maine policyholders as of December 2008, only 119 contracts were in the mandated plans (the HealthChoice Standard and Basic policies), with the vast majority of contracts in the non-mandated plans (the HealthChoice and Lumenos policies). (R.B. 1, p. 186.) HealthChoice membership makes up almost 90% of the combined pool. (*Id.*, p. 197.) In terms of average annual premium per contract, Anthem

depicts the data as follows:

Average Annual Premium

	Non-Mandated	Mandated	
Before rate increase:	$5,831	$13,355	
After rate increase:	$6,924	$14,579	
Dec. 2008 contracts:	11,846	119	[Total 11,965][10]

(*Id.*, p. 186.) This table demonstrates a proposed average rate increase of 18.75% for nearly all of Anthem's policyholders (the 99% of them with non-mandated plans), leaving the remaining policyholders under mandated plans with a proposed 9.2% average rate increase. (*See also id.*, p. 220.)

In addition to the average annual premium of approximately $6,000 paid by Maine consumers to Anthem in 2008, these same individuals paid their own health care costs below the deductible. The average deductible was $7,250 in that year, and is projected to grow to an average of $7,570 in 2009. (R.B. 1, p. 253.)[11] That means the average policyholder would have had to incur a total cost of more than $13,000 in premium and deductibles, prior to becoming eligible to receive any health benefits under the policy (other than benefits paid on a "first dollar" basis).[12] In 2008, the average out-of-pocket cost actually

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[10] Anthem projected average enrollment for the 12-month period July 1, 2009 – June 30, 2010 to be 12,305, as compared to actual December 2008 enrollment of 11,965. (R.B. 1, pp. 186, 203.)

[11] Page 253 is only one page of the multi-page spreadsheet filed by Anthem with the Superintendent in the agency proceeding, the remainder of which inadvertently was not included in the record previously filed with the Court. A full copy of the relevant portion of the spreadsheet will be filed with the Court, if requested.

[12] Under the mandated plans and the Lumenos plans, benefits for certain preventive care are not subject to the deductible. Similarly, under HealthChoice plans with the

paid by Anthem policyholders for health care was approximately $2,350 per household.[13] (R.B. 1, pp. 226.) That means the average policyholder in fact incurred a total cost of almost $8,500 for insurance and health care.

For the period that Anthem has operated the Maine Blue Cross and Blue Shield plan (beginning in 2000), the profit and risk margin allowed in rates generally has been 3% pre-tax, with profits (losses) actually achieved often varying significantly as follows:

Anthem Individual Line of Insurance				
	Profit (loss) %		Average Rate Increase	Insurance Docket[14]
Year	Margin in Rates	**Actually Achieved**		
2000	1%[15]	**9.4%**	15.7%	INS-99-9
2001	3%	**11.0%**	23.5%	No proceeding
2002	4%	**13.8%**	12.7%	INS-01-2532/2534
2003	3%	**7.0%**	3.4%	INS-02-785
2004	No rate filing	**1.6%**		
2005	3%	**(4.2)%**	14.5%	INS-04-610
2006	3%	**(7.9)%**	16.3%	INS-05-820
2007	3%	**5.3%**	16.7%, 1.3%	INS-06-1000
2008	3%	**2.8%**[16]	12.5%	INS-07-1000
Weighted Average		3.2%[17]		

PCSA rider, benefits for certain preventive care and accidents are not subject to the deductible. These constitute benefits paid on a "first dollar" basis.

13 The calculation of the out-of-pocket cost was determined on the basis of the difference between allowed and paid claims for the year ending September 30, 2008. (*See* R.B. 1, p. 226.) Thus, $329.08 - $213.88, or $115.20 per member per month, multiplied by 12 months and an average 1.71 members per contract, results in an average annual out-of-pocket cost per contract of $2,364. (*Id.*)

14 The Superintendent's hearing decisions are available on the Bureau of Insurance webpage at http://www.state.me.us/pfr/insurance/hearing_decisions.

15 The 1% was a contribution to reserves for the non-profit Blue Cross and Blue Shield, before its business was acquired by Anthem part way through 2000.

16 Based on actual data through December 2008, with data thereafter not included as part of the record. *See also* footnote 8, above.

(R.B. 1, pp. 187, 232.) Since inception, the average rate increase for HealthChoice has been as follows:

Effective Date	Increase
Jul-92	9.4%
Jul-93	14%
Jun-95	15.3%
Sep-96	17%
Oct-97	6.3%
Jan-99	20.4%
Nov-99	15.7%
Jan-01	23.5%
Feb-02	12.7%
Jan-03	3.4%
Mar-05	14.5%
Mar-06	16.3%
Jan-07	16.7%
Jul-07	1.3%
Jan-08	12.5%

(*Id.*, p. 187.)

Anthem's request for an 18.5% average rate increase effective July 1, 2009 – a revised annual revenue requirement of over $75.5 million – was based on the Company's projections of adjusted claims expense (*i.e.*, payment of health benefits on behalf of policyholders) at approximately $65.1 million (or 86%), administrative expenses at approximately $5.3 million (or 7%), a pre-tax profit and risk allowance of approximately $2.3 million (or 3%), with the remaining $2.9 million (or 4%) for commissions, premium tax, and savings offset payments. (R.B. 1, p. 232.)

[17] This weighted average was weighted by the total premium for each year. In other words, 3.2% represents the total profit for the nine-year period divided by the total premium for the nine-year period.

The Attorney General for the State of Maine ("AG") intervened as of right in the proceeding. (R.B. 5, p. 973; R.B. 2, p. 267.) The AG argued that Anthem's profit and risk margin of 3% sought in rates was excessive and urged the Superintendent to allow no profit for the upcoming rating period. (R.B. 5, pp. 1138-1141.) The AG did recommend a rate increase, but a smaller one than was requested by Anthem. (*Id.*, p. 1142.) Consumers overwhelmingly opposed Anthem's rate increase request in its entirety through testimony provided at three public hearings (R.B. 6, pp. 1209-1426), written public testimony (*id.* pp. 1150-1208), and written comments (R.B. 7, pp. 1612-2287).[18]

Based on the entire record, on May 18, 2009, the Superintendent denied Anthem's request for an 18.5% average rate increase as being excessive and unfairly discriminatory. (R.B. 2, pp. 295-314, specifically pp. 312-314.) Further, as required by law,[19] the Superintendent specified the revised filing that she would approve, resulting in an average rate increase of 10.9%; finding and concluding that the revised rates would not be excessive, inadequate, or unfairly discriminatory. (*Id.*, p. 313.) Except for the regulatory disallowance of the cost of the colonoscopy benefit change and the 20% cap on the rate increase for current Lumenos policyholders (both resulting from Anthem's own action or inaction and neither of which has been appealed by Anthem), the

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[18] Pursuant to the terms of the Superintendent's Procedural Order, dated February 10, 2009, communications from the general public were maintained as part of the record of the proceeding. (R.B. 2, pp. 267-274, specifically Section X at p. 274.)

[19] *See* 24-A M.R.S. § 2736-B (2008).

approved rates are "break-even" with no expected loss and no expected profit.[20] (*Id.*, pp. 311-312.) The Superintendent based her determination of the break-even rate level on Anthem's own assumptions and projections with a few modifications, which Anthem also has not appealed.

Regarding the issue on appeal – the decision to provide no profit and risk margin in Anthem's rates for this one-year rating period – the Superintendent explicitly supported her decision with the following findings of fact:

- "Over the nine-year period [that Anthem has owned the company], the pre-tax operating gain totaled nearly [$17.4 million][21] and averaged 3.2% of total revenue."
- "[Anthem's] pre-tax gain was 5.3% in 2007 [or $3.6 million] and 2.8% in 2008 [or $1.8 million]."
- "[T]he HealthChoice and Lumenos policyholders have contributed to [Anthem's company-wide] surplus."

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[20] While Anthem has not challenged the Superintendent's decisions regarding the colonoscopy benefit change and the rate cap for current Lumenos policyholders, in three instances the Company has baldly asserted that the approved rates are "confiscatory" with no legal analysis or argument in support of its confiscation claim. (Anthem Br. at 2, 8, in section heading, and 10: "Because the Superintendent's rates, including a 0% risk and profit charge, are confiscatory, the Superintendent's Decision should be vacated and remanded with instructions to include at least a 3% pre-tax risk and profit charge in Anthem BCBS's individual insurance rates that allows for a reasonable contribution to the surplus of the Company.") Confiscation is a constitutional violation. Because it requires a higher standard of proof than the statutory violations alleged by Anthem, Anthem's conclusory confiscation claim necessarily fails when Anthem's rate inadequacy claim fails. "[C]onfiscation is judged with an eye toward the regulated firm as an enterprise. That is to say, it depends in this context on the condition of the insurer as a whole -- and not on the fortunes of any one or more of its lines . . .. Confiscation may perhaps turn on an insurer's [specific line] if the insurer writes that line only. But it appears few insurers, if any, satisfy this condition." *20th Century Ins. Co. v. Garamendi*, 878 P.2d 566, 625 (Cal. 1994). In essence Anthem has used the term "confiscatory" as a synonym for "inadequate," and did not make a true confiscation claim.

[21] The Decision used the figure $16 million. However, as explained above in footnote 7, that was a mathematical error.

- "While a break-even rate level would not contribute further to [Anthem's company-wide] surplus, it would not be a drain either."

- "[T]he existence of the individual line would continue to provide an indirect benefit to [Anthem] because it provides a larger base over which to spread fixed expenses."

- Notwithstanding Anthem's repeated allegations of historic losses, "for the nine years Anthem has owned the company (2000-2008), [2005 and 2006] were the only [years] that [the individual product line] showed a loss."

(R.B. 2, pp. 311-312.) The Superintendent also found evidence in the record supporting the AG's recommendation for no profit margin in rates this year, based on "(1) a unique economic situation resulting in extreme financial hardship for subscribers,[22] and (2) the extreme financial health of the company." (*Id.*, p. 311.) Contrary to Anthem's assertion that "[i]mportantly here, the Superintendent made no finding that a 3% pre-tax profit is excessive" (Anthem Br. at 9), the Superintendent expressly found that the rates requested were excessive "for reasons set forth in Section IV" of the Decision. (*Id.*, p. 312.) Section IV was the analysis of why it was reasonable and appropriate to disallow a profit margin in rates this year.

On May 19, 2009, in compliance with the Superintendent's decision, Anthem filed revised rates with a 10.9% average increase effective July 1, 2009. (R.B. 1, pp. 254-263.) The Superintendent approved Anthem's compliance

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[22] Anthem argues that the testimony on financial hardship should be disregarded because none of the consumers "professed to have an actuarial background and/or familiarity with the financial and actuarial analysis reflected in Anthem BCBS's rate filing." (Anthem Br. at 12, *but see* consumer testimony of actuary Melinda Loring, R.B. 6, p. 1341.) Although actuarial analysis is central to other issues in the case, this is one issue that does not take an actuary to understand.

filing that same day, as submitted. (R.B. 2, p. 315.) Anthem timely filed its appeal with this Court on June 11, 2009. Thereafter, on July 1, 2009, Anthem implemented the revised rates that were approved by the Superintendent for individual health insurance coverage to Maine consumers under the Company's HealthChoice, HealthChoice Standard, HealthChoice Basic, and Lumenos Consumer Directed Health Plan products.

STANDARD OF REVIEW

Anthem has brought this appeal pursuant to M.R. Civ. P. 80C and 5 M.R.S. §§ 11001 – 11008 (2008). The Court reviews the Superintendent's decision "for errors of law, abuse of discretion, or findings of fact not supported by the record." *Id.* at § 11007; *S.D. Warren Co. v. Bd. of Envtl. Prot.*, 2005 ME 27, ¶ 4, 868 A.2d 210, 213, aff'd 547 U.S. 370 (2006). The Court has stated:

> We review the interpretation of a statute directly for errors of law. *Town of Ogunquit v. Dep't of Pub. Safety*, 2001 ME 47, ¶ 7, 767 A.2d 291, 293. When construing a statute, we attempt to give effect to legislative intent by examining the plain meaning of the statutory language. *Charlton v. Town of Oxford*, 2001 ME 104, ¶ 10, 774 A.2d 366, 371.

Melanson v. Sec'y of State, 2004 ME 127, ¶ 8, 861 A.2d 641, 644. "Unless the statute reveals a contrary intent, – the words 'must be given their plain, common and ordinary meaning.' We will not look beyond clear and unambiguous statutory language." *Tibbetts v. Maine Bonding & Casualty Co.*, 618 A.2d 731, 733 (Me. 1992), *quoting State v. Edward C.*, 531 A.2d 672, 673 (Me. 1987); *see also Arsenault v. Sec'y of State*, 2006 ME 111, ¶ 11, 905 A.2d 285, 288 (If the statute is unambiguous, it is interpreted according to its plain

language.) The Legislature's established rules of construction explain that statutory "[w]ords and phrases shall be construed according to the common meaning of the language." 1 M.R.S. § 72(3) (2008). And the Law Court often relies upon dictionaries to determine the plain, common, and ordinary meaning of statutory terms. *Rockland Plaza Realty Corp. v. City of Rockland,* 2001 ME 81, ¶ 12, 772 A.2d 256, 260.

The Court will give great deference to the Superintendent's construction and application of a technical statute administered by it and uphold the agency unless the statute plainly compels a contrary result. *Thacker v. Konover Dev. Corp.,* 2003 ME 30, ¶ 14, 818 A.2d 1013, 1019; *Imagineering, Inc. v. Superintendent of Ins.,* 593 A.2d 1050, 1053 (Me. 1991); *York Mut. Ins. Co. v. Superintendent of Ins.,* 485 A.2d 239, 241 (Me. 1984). The burden of proof rests with Anthem, as the party seeking to overturn the Superintendent's decision. *International Paper Co. v. Board of Envtl. Prot.,* 1999 ME 135, ¶ 11, 737 A.2d 1047, 1050. Anthem "must prove that no competent evidence supports the [Superintendent's] decision and that the record compels a contrary conclusion." *Bischoff v. Board of Trustees,* 661 A.2d 167, 170 (Me. 1995); *see also Hale-Rice v. Maine State Retirement Sys.,* 1997 ME 64, ¶ 17, 691 A.2d 1232, 1237.

"An administrative decision will be sustained if, on the basis of the entire record before it, the agency could have fairly and reasonably found as it did." *Seider v. Board of Exam'rs of Psychologists,* 2000 ME 206, ¶ 9, 762 A.2d 551, 555, *citing CWCO, Inc. v. Superintendent of Ins.,* 1997 ME 226, ¶ 6, 703 A.2d

1258, 1261. The Court is not to substitute its judgment for that of the administrative agency. *Seider v. Board of Exam'rs of Psychologists*, 2000 ME 118, ¶29, 754 A.2d 986, 993; *Seven Islands Land Co. v. Maine Land Use Regulation Com.*, 450 A.2d 475, 479 (Me. 1982). In considering whether there is substantial evidence in the record, the reviewing court is to "search the entire record . . . to determine whether on the basis of all the testimony and exhibits before the agency it could fairly and reasonably find the facts as it did." *In re Maine Clean Fuels, Inc.*, 310 A.2d 736, 741 (Me. 1973) (citations and internal quotes omitted); *Seider*, 2000 ME 118, ¶ 29, 754 A.2d at 993; *Seven Islands*, 450 A.2d at 479.

MAINE RATING LAWS

There are three broad categories of health insurance coverage provided by insurers: large group, small group, and "non-group" (individual and family coverage). The individual (non-group) health insurance at issue here provides coverage to one person (or family), with the insurance contract running between the insurer and the individual(s). In group health insurance, the insurance contract is between the insurer and the group sponsor (typically an employer), with covered individuals (employees) receiving certificates of coverage (which may also cover the certificate holder's dependents). "Small group" coverage refers to businesses that employ on average 50 or fewer employees. *See* 24-A M.R.S. § 2808-B (2008). The rating laws for small groups are set forth at sections 2808-B(2), (2-A), (2-B), and (2-C). Coverage for employees of businesses that employ on average greater than 50 employees is

commonly referred to as "large group" coverage. The rating of large group health plans is not regulated by the Superintendent.

The rating laws for individual health insurance, *i.e.*, the laws at issue here, are set forth at 24-A M.R.S. §§ 2736, 2736-A, 2736-B, and 2736-C (2008). Under these laws, specific to individual health insurance, rates must not be "excessive, inadequate, or unfairly discriminatory." *See* 24-A M.R.S. §§ 2736(2), 2736-A. Thus, when an insurer proposes a rate change for its individual health insurance policies it must file its proposed revised rates with the Superintendent. *Id.* at § 2736(1). The three-pronged rating standard then appears twice by reference in Chapter 33. First, the Legislature established that the Superintendent may require more information from the insurer if she is unable to determine whether the filing "meets the requirements that rates not be excessive, inadequate or unfairly discriminatory." *Id.* at § 2736(2). Second, the Legislature directed that the Superintendent must hold a hearing if she believes that the filing "does not meet the requirements that rates not be excessive, inadequate, unfairly discriminatory." *Id.* at § 2736-A. The "inadequacy" of rates is not defined by Maine law in relation to individual health insurance; neither is "excessiveness" nor "unfairly discriminatory." However, the plain, dictionary meaning of "inadequate" means "not adequate," and the plain, dictionary meaning of "adequate" means "satisfactory, suitable, or sufficient." The approved rates meet the statutory adequacy standard.

ARGUMENT

I. The Superintendent properly exercised her authority under 24-A M.R.S. § 2736 in approving as adequate a 10.9% average rate increase for Anthem for the one-year rating period July 1, 2009, through June 30, 2010.

As explained below, there is no requirement under section 2736 that the Superintendent must affirmatively provide for a profit and risk margin in rates at all times and under all circumstances. 24-A M.R.S. § 2736 (2008). The plain language of section 2736 does not support Anthem's assertion to the contrary. The only requirement under section 2736 is that the rates must be "adequate," and not excessive or unfairly discriminatory. Rate adequacy is primarily a solvency standard, particularly in the context of the questions at issue in the underlying agency proceeding. The amount of a profit and risk margin in rates, if any, that may be affirmatively approved by the Superintendent is within the exercise of her discretion based on the facts and circumstances at the time of the rate review and as determined on a case-by-case basis.

The Superintendent's analysis of the facts and circumstances in this case properly included a review of the financial soundness of Anthem's individual line of insurance as a self-sustaining line of business, within the framework of the overall financial health of the Company. Nowhere does section 2736 prohibit the Superintendent from considering all relevant factors when performing her rate review. Anthem's financial operations are managed on a company-wide basis, thereby demonstrating the relevance of Anthem's overall financial health to the Superintendent's rate review. Historically,

Anthem's company-wide financial position has been a factor in the Superintendent's decision-making.

It must also be kept in mind that the "break-even" nature of the rates is an actuarial projection, not an inevitability. As the record demonstrates, actual experience nearly always differs from the projections, often significantly. Furthermore, the break-even projection is dependent on a number of assumptions, including the assumption that historical trends in Company operations will continue, so that past expense patterns are a reliable predictor of future expense patterns. Anthem has the ability to re-examine those patterns and see whether additional expense savings are possible. Under the current economic conditions, significant cost-cutting measures have been widespread among businesses and individuals, including many of Anthem's own policyholders.

A. Maine's insurance laws do not require the Superintendent to affirmatively provide for a profit and risk margin in rates for all products at all times and under all circumstances.

Anthem repeatedly asserts throughout its brief, as if to make true, that for individual insurance rates to be "adequate" within the meaning of 24-A M.R.S. § 2736 they must cover all expenses incurred by the carrier to provide the product, plus affirmatively provide for a reasonable rate of return (*i.e.*, a profit and risk margin) that results in a contribution to the surplus of

the Company.[23] (Anthem Br. at 1, 4, 8-10, 14.) Anthem does not cite to any legal authority as a basis for its alleged standard.[24] The only support Anthem

[23] The only reference to the adequacy requirement of the three-pronged rating standard under 24-A M.R.S. § 2736 is as follows (emphasis added):

> 2. Filing; information. When a filing is not accompanied by the information upon which the insurer supports such filing, or the superintendent does not have sufficient information to determine whether such filing *meets the requirements that rates not be excessive, inadequate or unfairly discriminatory*, the superintendent shall require the insurer to furnish the information upon which it supports the filing. A filing and supporting information are public records within the meaning of Title 1, section 402, subsection 3 and become part of the official record of any hearing held pursuant to section 2736-A.

It is also referenced in 24-A M.R.S. § 2736-A related to hearings.

[24] Anthem frequently cites to the Superintendent's public testimony concerning L.D. 1205, "An Act to Establish a Health Care Bill of Rights" (enacted as amended at P.L. 2009, ch. 439, eff. Sept. 12, 2009), arguing that the Superintendent's testimony supports Anthem's position in this appeal. (Anthem Br. at 5, 9, 11, n. 5, n. 8.) It does not. The Superintendent gave a capsule summary of her task under the current language of section 2736, describing it as an inquiry limited "to whether the rates for each product are adequate, but not excessive or unfairly discriminatory, in light of the costs associated with that product." The context was a provision that did not remain in the bill as enacted (*see* Comm. Amend. "A" to L.D. 1205, No. H-446 (124th Legis. 2009)), that could have been interpreted as shifting the primary focus of the inquiry to the insurer's overall profitability. The Superintendent was not saying that as a matter of law, "the costs associated with that product" were the only factor that can ever be considered at all under section 2736, but rather that "the costs associated with that product" are a core element of ratemaking because they are what determines when a rate is self-supporting. Factors such as the insurer's overall profitability are relevant only to the determination of whether the insurer's proposed profit margin is reasonable. There was never any suggestion that the only factor to consider in determining whether the proposed profit margin was reasonable was whether or not it was 3%. Anthem's suggested bright line standard is nowhere to be found in the applicable statutes, rules, or precedents. The Superintendent's concern with the proposed amendment to section 2736 was that it might have the effect of deeming rates for a product to be "excessive" even if the product was generating a loss, as long as the company as a whole was profitable. The Superintendent warned that such a standard raised significant public policy concerns: "If the intent of this provision is to allow rates to be deemed excessive based on the overall profitability of the carrier, whether or not the rates are sufficient to make the product self-supporting, it could have the unintended consequence of encouraging carriers to withdraw from the individual market entirely, and concentrate on more profitable group markets." (*Quoted in* Anthem Br. at 5.) Consistent with those concerns, the Superintendent approved self-supporting rates for Anthem's individual products in this case, despite

provides is the testimony of the AG's actuarial consultant acknowledging affirmatively, "yes," in agreement with Anthem counsel's characterization of the legal standard.[25] (Anthem Br. at 4; *citing* R.B. 6, p. 1584, lines 1-8.) The AG actuary's opinion is not law, and is certainly not a binding admission by the Superintendent. The Superintendent is entitled to consider, and did carefully consider, the totality of the expert testimony. There simply is no requirement under section 2736 that the Superintendent must affirmatively provide for a profit and risk margin in rates at all times and under all circumstances. The plain language of the statute does not support Anthem's assertion.

The only requirement under section 2736 is that the rates must be "adequate," and not excessive or unfairly discriminatory. The Legislature did not define the term "adequate" in the individual health insurance rating laws. Accordingly, the statutory term must be given its plain, common, and ordinary meaning. *Tibbetts*, 618 A.2d at 733, *quoting Edward C.*, 531 A.2d at 673; *Arsenault*, 2006 ME 111, ¶ 11, 905 A.2d at 288; 1 M.R.S. § 72(3). It is customary for the Court to rely upon dictionaries to determine the plain

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the hardship that any significant rate increase would cause consumers. This is a far cry from "doing that which the Legislature affirmatively rejected" (at the request of the Superintendent herself), as Anthem accuses the Superintendent of doing. (Anthem Br. at 10, n.5, emphasis in original.)

[25] At hearing, when the Superintendent made an inquiry of the AG's actuary for an interpretation of the Insurance Code, Anthem counsel objected as follows: "MR. ROACH: I'm going to object to the extent it calls for a legal conclusion. I don't think she's qualified to say what is the layman's terms of that." (R.B. 6, p. 1608, ln. 10-12.) That same objection applies to Anthem counsel's attempted reliance in briefing on the AG actuary's opinion on a question calling for a legal conclusion.

meaning of statutory terms. *Rockland Plaza Realty Corp.*, 2001 ME 81, ¶ 12, 772 A.2d at 260.

The term "inadequate" is defined as "1. Not adequate; insufficient; 2. Not able; incapable." AMERICAN HERITAGE DICTIONARY p. 649 (2nd college ed. 1982). The antonym to inadequate is "adequate," defined as "1. Able to satisfy a requirement; suitable; 2. Barely satisfactory or sufficient." *Id.*, p. 79.[26] The plain meaning of "adequacy" is a minimalist requirement. *Id.* In the context of section 2736, the adequacy standard is one which requires merely that rates be "satisfactory, suitable, or sufficient." The Superintendent complied with this standard in approving break-even rates.

The statute does not give Anthem a right to a profit margin in rates for this one-year rating period. Anthem's asserted interpretation to the contrary in this appeal impermissibly expands the meaning of "adequacy" beyond its ordinary usage.[27] In other words, rates that provide for a profit and risk

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[26] These terms are defined similarly elsewhere as follows: "Inadequate" means "Insufficient; disproportionate; lacking in effectiveness or in conformity to a prescribed standard or measure." BLACK'S LAW DICTIONARY p. 683 (5th ed. 1979). "Adequate" means "Sufficient; commensurate; equally efficient; equal to what is required; suitable to the case or occasion; satisfactory." *Id.* p. 36.

[27] In analyzing Anthem's 2007 individual rates and deciding what level of profit and risk margin was appropriate that year, the Superintendent explained that "[w]hile there is a significant risk that [the individual] line will lose money in any given year, there is *very little risk that this will impair the Company's solvency*, both because this line is small relative to the Company's total business and because the Company [overall] currently enjoys an extremely healthy surplus." Superintendent Decision, Docket No. INS-06-1000 (November 11, 2006), p. 12. Analyzing rate adequacy in terms of solvency is also consistent with comments that Anthem itself submitted in a

margin are more than just adequate (*i.e.*, "barely satisfactory or sufficient"), but instead include an additional cushion or margin above costs. Where surplus (*i.e.*, available funds) exists due to the financial health of an insurer, a margin in rates provides more than is required to meet the statutory adequacy standard.

Anthem asserts that in contrast to the consumer protections provided by the prohibitions against excessive and unfairly discriminatory rates, the purpose of the prohibition against inadequate rates is to protect the insurer. (Anthem Br. at 8-9.) That misconstrues the meaning and purpose of the rate adequacy requirement. Insurers are not merely allowed to charge adequate rates – they are required to charge adequate rates. This is to prevent them from gambling with their consumers' money by charging rates so low as to threaten the insurer's solvency, and to prevent them from gaining an unfair advantage in the market through predatory pricing.

The possible anti-competitiveness of Anthem's rates is not an issue in this appeal. Thus, in the context of this case, the adequacy standard under section 2736 is a solvency test and no more. *See, e.g., Utilities Ins. Co. v. State*

Bureau of Insurance rulemaking proceeding, where the Company interpreted section 2736 as follows:

> For example, the Maine Insurance Code requires that rates not be excessive, inadequate or unfairly discriminatory (24-A M.R.S.A. § 2736(2)). . . . Before the Superintendent could order that any rate increase be waived, there must be some demonstration that the resulting rates would not be inadequate. *To do otherwise would risk putting a health insurance carrier in a financially unstable position and create the risk that a carrier would be unable to pay claims.*

Written comments of Kristine M. Ossenfort, Esq., of Anthem to Superintendent Mila Kofman, August 17, 2009 (emphasis added).

Ins. Board, 84 P.2d 619, 621 (Okla. 1938) ("The decisive question, therefore, is whether under the evidence the proposed rate is inadequate for the safety and soundness of the [insurer.]") Any regulatory approval of a profit and risk margin in insurance rates is discretionary, and distinct from solvency considerations. The analysis of whether to provide affirmatively for a profit and risk margin in rates depends upon the applicable facts and circumstances at the time of rate review, as determined by the Superintendent on a case-by-case basis upon the evidence in the record.

The Superintendent properly exercised her authority under section 2736 to disallow in full Anthem's request for a profit and risk margin in rates for this one-year rating period, based on the facts in the record, where she found the proposed rates to be excessive and the revised rates to be adequate. The Superintendent's decision appropriately applied a plain, common, and ordinary meaning to the term "adequate." *See Tibbetts*, 618 A.2d at 733, *quoting Edward C.*, 531 A.2d at 673; *Arsenault*, 2006 ME 111, ¶ 11, 905 A.2d at 288; 1 M.R.S. § 72(3). The Court should uphold the Superintendent's decision.

B. Maine's insurance laws do not prohibit the Superintendent from considering both the financial health of Anthem's individual insurance business and the overall financial health of the Company when performing her rate review.

Anthem argues that in finding the revised rates to be adequate, the Superintendent violated section 2736, which regulates only individual insurance products, when she relied, in part, on the overall financial health of the Company. (Anthem Br. at 11.) It must be emphasized, again, that the Superintendent explicitly relied in her written decision on the financial results

of the individual line of insurance itself – the $17.4 operating gain (profit) from Anthem's individual line of insurance (from 2000-2008),[28] and the average 3.2% of total revenue that this represented. (R.B. 2, p. 311.) Also cited by the Superintendent was the 5.3% gain from the individual line of insurance in 2007, or nearly $3.6 million profit (which Anthem describes as "moderate" at page 7 of its brief), and the 2.8% gain in 2008, or nearly $1.8 million profit. (*Id.*) Anthem's complaint that the Superintendent relied on the "overall" financial health of the Company in her decision-making, as opposed to the financial health of Anthem's individual line of insurance, is overstated. (*See* Superintendent Decision at R.B. 2, pp. 311-312.)

In any event, the Superintendent's analysis of whether Anthem's proposed rates were "excessive, inadequate, or unfairly discriminatory" properly includes due consideration of all relevant factors. Nowhere does section 2736 prohibit the Superintendent from considering the overall financial health of an insurer when performing her rate review. Moreover, any analysis of the adequacy, or "sufficiency," of rates must acknowledge the relevant context.

Anthem maintains its surplus (*i.e.*, available funds) on a consolidated, company-wide basis and has used the company-wide surplus to make dividends to its corporate parent. (*See, e.g.*, R.B. 5, pp. 1023-1030.) Undoubtedly, the financial strength of the overall Company is a relevant factor

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[28] *See* footnote 7, above.

in the Superintendent's rate review.[29] When a product line has a profitable year (like Anthem's individual line did in years 2000, 2001, 2002, 2003, 2004, 2007, and 2008), that line of insurance contributes positively to Anthem's company-wide surplus. (R.B. 1, p. 232.) Conversely, when a product line has losses in any year (like the individual line did in years 2005 and 2006), Anthem's company-wide surplus is available to cover those losses. (*Id.*; *see also* AG actuary testimony at R.B. 6, pp. 1608-1609.) The functional realities of Anthem's operations, therefore, demonstrate that the overall financial position of the Company is extremely relevant to the Superintendent's rate review.

The relevance of Anthem's company-wide financial soundness in rate review proceedings is not novel and has historical underpinnings. For example, in reviewing Anthem's 2003 individual rates, the Superintendent analyzed the Company's proposed profit margin target as follows:

> [The correlation of profit margins to risk], however, must be weighed against other considerations. The Comparative Premium Rate Analysis was prepared in 1999 at a time when Anthem's predecessor [the non-profit BCBS] had been unprofitable and in financial distress. In contrast, most recently Anthem has been able to operate profitably and to contribute to the Company's surplus position as demonstrated in year-end filings made with the

[29] *See, e.g., State ex rel. Turpen v. Oklahoma State Bd. for Property & Casualty Rates*, 731 P.2d 394, 404 (Okla. 1986), *citing Utilities Ins. Co. v. State Ins. Board*, 84 P.2d 619, 621 (Okla. 1938) ("We have long held that one of the most important factors in determining whether rates are inadequate [under the three-pronged rating standard] is the financial soundness of the insurer. Evidence considered by the Board may include annual financial statements or other data forms from which net profit and dividends actually paid may be considered.")

> Bureau of Insurance. . . . [T]hese considerations warrant a lower profit margin than reflected in the Company's proposed rates.

Superintendent Decision, Docket No. INS-02-785 (November 8, 2002), pp. 7-8. Regarding Anthem's 2005 individual rates, the Superintendent's analysis recognized that "[t]he HealthChoice line has contributed substantially to the increase of Anthem's [company-wide] surplus in recent years." Superintendent Decision, Docket No. INS-04-610 (December 16, 2004), pp. 12-13. And for Anthem's 2007 individual rates the Superintendent explained:

> Second, while there is a significant risk that [the individual] line will lose money in any given year, there is very little risk that this will impair the Company's solvency, both because this line is small relative to the Company's total business and because the Company [overall] currently enjoys an extremely healthy surplus.

Superintendent Decision, Docket No. INS-06-1000 (November 9, 2006), p. 12. The principles relied upon in the Superintendent's analysis for Anthem's 2009-2010 individual rates are no different from prior decision-making, which similarly analyzed company-wide financial health as a relevant factor. (R.B. 2, pp. 311-312.)

The consideration of the overall financial health of Anthem in rate review proceedings is consistent with historical agency decision-making. The financial soundness of an insurer from a company-wide perspective is one relevant factor, among others, in the Superintendent's evaluation of whether a given rate request is "excessive, inadequate, or unfairly discriminatory." The Court should defer to the Superintendent's administration of a statute within her area of technical expertise and specialized knowledge, and should uphold the Superintendent's application of section 2736 where the statute does not compel

a contrary result. *See Thacker*, 2003 ME 30, ¶ 14, 818 A.2d at 1019; *Imagineering*, 593 A.2d at 1053; *York*, 485 A.2d at 241.

II. The Superintendent's decision to provide Anthem "no profit and risk margin this year" in rates is supported by the whole record.

In its brief, Anthem conveniently limits the extent of the Superintendent's reasons for disallowing a profit margin in rates for this one-year rating period to two factors: "(1) a unique economic situation resulting in extreme financial hardship for subscribers, and (2) the extreme financial health of the company." (Anthem Br. at 10-13; Superintendent Decision at R.B. 2, p. 311.) These were the factors identified by the AG in support of her position that a 3% profit and risk margin was excessive at this particular time, and recommending a zero profit margin for this rating period. (R.B. 5, pp. 1138-1141.) The Superintendent found the AG's stated factors to be supported by "ample evidence" in the record and that, "[u]nder these circumstances, it is reasonable to allow no profit and risk margin this year." (R.B. 2, p. 311.)

The Superintendent's decision not to provide Anthem a profit and risk margin in rates for this one-year rating period, however, was based not only on those factors cited by the AG but also on several others. (R.B. 2, pp. 311-312.) The other explicit factors relied on by the Superintendent in her decision-making were: that Anthem's pre-tax operating gain from its individual line of insurance was $17.4 million during the nine years it owned the Company (2000-2008);[30] that Anthem's nine-year weighted average gain from the

[30] *See* footnote 7, above.

individual line was 3.2% of total revenue from this line; that Anthem had pre-tax gain from the individual line of insurance of 5.3% in 2007 (or nearly $3.6 million profit), and 2.8% in 2008 (or nearly $1.8 million profit) – totaling approximately $5.4 million of profit from this line in the last two years; that Anthem had experienced losses in its individual line of insurance in only two of the last nine years; that HealthChoice and Lumenos members have contributed $17.4 million to Anthem's company-wide surplus should it be needed to cover any potential losses from the individual line of insurance in 2009-2010; that although a break-even rate (*i.e.*, no profit) in the individual line of insurance would not contribute further to Anthem's company-wide surplus, neither would it be a drain (*i.e.*, the approved rates will not result in losses if Anthem's assumptions, as modified by the Superintendent in her decision,[31] hold true); and that the existence of the individual line of insurance would continue to provide an indirect benefit to Anthem in that it provides a larger policyholder base over which to spread administrative costs (thereby providing Anthem the ability to offer lower rates for its group insurance products). (R.B. 2, pp. 311-312.) Thus, contrary to Anthem's assertion, the explicit factors relied on by the Superintendent in her decision-making were numerous and not two-fold.

In addition to the various explicit factors enunciated by the Superintendent in her written decision, the reviewing court is to "search the entire record . . . to determine whether on the basis of all the testimony and

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[31] The Superintendent's modifications were the result of extensive analysis of the factual record and the differences in the expert testimony, and Anthem has not appealed those modifications.

exhibits before the agency it could fairly and reasonably find the facts as it did." *In re Maine Clean Fuels*, 310 A.2d at 741; *Seider*, 2000 ME 118, ¶ 29, 762 A.2d at 993; *Seven Islands*, 450 A.2d at 479. As set forth in the Statement of Facts hereto (at pp. 1-16), the record is replete with evidence upon which this Court should conclude that the Superintendent fairly and reasonably approved as adequate a revised 10.9% rate increase for the one-year rating period July 1, 2009, through June 30, 2010; which does not affirmatively provide for a profit and risk margin in rates for this period. The Superintendent's decision is supported by competent and substantial evidence in the whole record and should be upheld by the Court.

III. The Superintendent's decision not to affirmatively provide any profit and risk margin in Anthem's rates for this one-year rating period did not violate Anthem's equal protection rights.

Anthem argues that the Superintendent's decision to provide no affirmative profit and risk margin in rates for this year violates the Company's equal protection rights guaranteed by the federal and state Constitutions. (Anthem Br. at 14-18.) Specifically, Anthem asserts that the Superintendent unfairly discriminated against the Company in comparison to: (1) one other individual health insurance carrier in Maine, The MEGA Life and Health Insurance Company ("MEGA"), for which the Superintendent affirmatively provided a 3% profit and risk margin in rates;[32] and (2) all other group insurance carriers in Maine "who are not subject to forced subsidization" (*i.e.*,

[32] *See* Superintendent Decision on MEGA 2009 Individual Rates, Docket No. INS-08-1000, December 1, 2008.

based on Anthem's erroneous assertion that a 0% profit and risk margin in rates requires the Company to subsidize its individual line of insurance business with dollars earned by its group insurance product line.)[33] (*Id.* at pp. 14-15.)

As acknowledged by Anthem, the Court must evaluate Anthem's equal protection claim under a rational basis analysis. (Anthem Br. at 15, *citing School Admin. Dist. No. 1 v. Commissioner, Dep't of Educ.*, 659 A.2d 854, 857 (Me. 1995) (Where there is no suspect class or fundamental rights at issue, "different treatment accorded to similarly situated persons need only be rationally related to a legitimate state interest.")) Under the rational basis standard, the burden is on Anthem to demonstrate that "there exists no fairly conceivable set of facts that could ground a rational relationship between the challenged [decision] and the government's legitimate goals." *Anderson v. Town of Durham,* 2006 ME 39, ¶ 29, 895 A.2d 944, 953-954, *quoting Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344, 356 (1st Cir. 2004). The Court should reject Anthem's Constitutional arguments because: (1) the Maine Insurance Code

[33] As explained earlier, break-even rates are just that – break-even: no expected loss, no expected profit. The approved rates are based on assumptions and projections that are not in dispute in this appeal. If the assumptions and projections hold true, there will be no loss and no profit. Under such a circumstance there would be no "requirement" for subsidization. Even if there is a loss, since 2000 the individual line has contributed approximately $17.4 million to Anthem's company-wide surplus, funds that could be made available to cover losses from the individual line in 2009-2010, if any, without requiring subsidization from any other line of business. As discussed, however, break-even means that a profit using the approved rates is just as likely as a loss – perhaps even more likely, to the extent that Anthem has some degree of control over cost elements that the rating assumptions took as given. Thus, any claim that Anthem must "subsidize" losses based on the approved rates is both highly speculative and contrary to Anthem's own projections. In short, the factual basis underpinning Anthem's equal protection argument is unsupported.

does not require the Superintendent to provide affirmatively for a 3% profit and risk margin in rates, but requires only that the approved rates must not be "excessive, inadequate, or unfairly discriminatory;" (2) Anthem is not similarly situated to MEGA or to Maine group insurers; and (3) the Superintendent's treatment of Anthem is permissible under the unique circumstances of this case because it is rationally related to a legitimate governmental interest.

First, as explained above, the requirement for individual health insurance products is that rates must not be "excessive, inadequate, or unfairly discriminatory." *See* 24-A M.R.S. §§ 2736(2), 2736-A. This rating determination is made by the Superintendent on a case-by-case basis in the context of the facts and circumstances as they exist at the time of rate review. There is no statutory requirement for the Superintendent to make affirmative provision for a profit in rates to every insurance company in every line of business in every year, and certainly no statutory requirement that every insurer be affirmatively provided the same level of profit in rates, if any. The Superintendent has the statutory authority to approve rates which are not excessive, inadequate, or unfairly discriminatory, a component of which is determining an appropriate profit and risk margin based on the evidence in the record.

For MEGA, in a rate review proceeding that culminated at the beginning of December 2008, the Superintendent determined that an average rate increase of 2.2% was appropriate which affirmatively provided for a 3% profit and risk margin. MEGA had requested a profit and risk margin of 8.2%, which

the Superintendent rejected based on the record of the proceeding. In making her decision the Superintendent also recognized the need for equity in the marketplace with MEGA's only significant competitor, Anthem, which at the time had approved rates with a 3% profit and risk margin (pursuant to a 2007 Superintendent Decision, INS-07-1000 (November 13, 2007)).[34] As we know, in mid-May 2009 the Superintendent approved a much larger rate increase for Anthem as compared to MEGA, averaging 10.9% with no affirmative profit and risk margin in rates. The evidence in the record of the Anthem rate review proceeding supports the Superintendent's determination. The Superintendent is not bound by her determinations made in the MEGA rate review proceeding which were based on a different evidentiary record at a different point in time. Anthem's equal protection rights were not violated by the Superintendent's approval of rates which were determined to be not excessive, inadequate, or unfairly discriminatory in accordance with the Maine Insurance Code.

A 3% profit margin previously had been considered reasonable for individual health insurance rates in a wide range of circumstances. As the Superintendent found at the time of her rate review in 2009, these are not ordinary times. Requiring the Superintendent to grant Anthem the same profit margin most recently granted at the end of 2008 to MEGA, and then requiring the Superintendent to grant MEGA in any future rate proceeding the same

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[34] Regarding equity in the marketplace, which is but one factor analyzed by the Superintendent, there is no legal requirement for the Superintendent to continue to provide MEGA a 3% profit and risk margin in rates in any future rate review proceeding.

profit margin most recently granted to Anthem in 2009, would have the effect of codifying a bright line standard on a permanent basis, which is the antithesis of the reasoned analysis of particular circumstances that the Superintendent is required to conduct.

Second, Anthem is not similarly situated to MEGA or to all the other group insurance carriers in Maine. Anthem is the only carrier that maintains both an individual insurance line of business and a group insurance line of business in Maine. The record demonstrates that this business model, chosen by Anthem, has been successful. Anthem cannot then turn around and argue that it is similarly situated to individual carriers that have no group business, and similarly situated to group carriers that have no individual business, and must be treated exactly the same way as each of them – even when the two categories are treated differently from one another. In addition, year-to-year differences in claims, expenses, number of contracts, etc. necessarily differentiates Anthem's 2009 rate filing from past rate filings by Anthem and other carriers.

Finally, even if the Court accepts Anthem's argument that it is similarly situated both to MEGA and to all other group insurers in Maine, the Superintendent's decision not to make affirmative provision for a profit and risk margin in Anthem's rates for this one-year rating period is rationally related to a legitimate governmental interest and, therefore, does not violate the Company's equal protection rights under the state and federal Constitutions. In other words, even if Anthem could show that there were (1) other similarly

situated insurers that (2) were somehow treated unequally by the Superintendent, her decision still passes rational basis scrutiny.

Some of the considerations historically undertaken by the Superintendent in conducting rate review proceedings and determining whether or to what extent to affirmatively provide a profit and risk margin in rates include "the need to keep premiums as affordable as possible"[35] and the concern that "rising rates have caused adverse selection in [Anthem's individual] line . . . [and that] [a]dding to the profit and risk margin, thereby increasing rates even more than dictated by the high claims trend, would only exacerbate this problem."[36] The affirmative inclusion of a profit and risk margin in Anthem's rates this year would have increased the individual rates even more than the approved 10.9% average increase. Put another way, the

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[35] Superintendent Decision on Anthem 2005 Individual Rates, Docket No. INS-04-610, December 16, 2004 ("Other factors to consider in determining an appropriate margin are the degree of uncertainty in the projections of claims and administrative expenses and the need to keep premiums as affordable as possible.")

[36] Superintendent Decision on Anthem 2007 Individual Rates, Docket No. INS-06-1000, November 9, 2006 ("First, as Anthem has noted, rising rates have caused adverse selection in [its individual] line. Adding to the profit and risk margin, thereby increasing rates even more than dictated by the high claims trend, would only exacerbate this problem.") "Adverse selection" occurs when people who sign up for an insurance plan have costs that are greater than the expected costs that the insurance plan used to calculate the premium. When adverse selection occurs, the average expected cost of people in a plan is higher than the insurer planned. The insurer loses money. If the insurer then raises the premium, the higher premium causes relatively lower cost people to drop the policy, which pushes up the average cost of those remaining. The insurer loses money again and raises the premium again. Again, this forces lower cost people to drop out. This vicious cycle (sometimes called the "Premium Death Spiral") continues until only the highest cost people are left in the policy. Most people have then dropped out and are uninsured. Adverse selection is a problem for insurance companies because it causes them to lose money. Adverse selection can be a problem for consumers as well when it causes them to be unable to get health insurance at affordable prices.

Superintendent considered the viability of the "pool" of Anthem's insureds who, in these particular circumstances, were experiencing significant economic pressures in addition to the rising costs of health insurance. Because addressing the concerns of maintaining the viability of the "pool," keeping premiums as reasonable as possible, and minimizing adverse-selection fall within the Superintendent's rate review authority, the Court should conclude that the Superintendent's decision is rationally related to a legitimate governmental interest. Therefore, the Superintendent did not violate Anthem's Constitutionally-guaranteed equal protection rights.

CONCLUSION

For all of the foregoing reasons, the Superintendent's Decision and Order dated May 18, 2009, should be affirmed.

September 23, 2009

Respectfully submitted,

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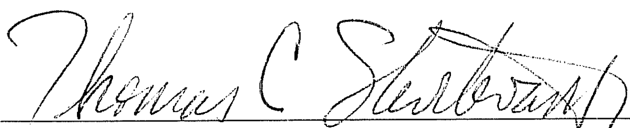

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