STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB- AP-09-36

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

Petitioner

v.

ORDER ON 80C APPEAL

SUPERINTENDENT OF INSURANCE,

Respondent

and

ATTORNEY GENERAL OF THE STATE OF MAINE,

Party–In–Interest

Before the court is the Rule 80C appeal of Petitioner, Anthem Health Plans of Maine, Inc. d/b/a Anthem Blue Cross and Blue Shield ("Anthem") from the Decision and Order of the Superintendent of Insurance, dated May 18, 2009, denying a portion of Anthem's 2009 rate increase request for its individual health plan insurance products and specifying the rate she would approve should Anthem submit a new filing. *See* M.R. Civ. P. 80C*; also see* 24-A M.R.S. § 2736-B.

Following the May 18th Decision and Order, Anthem submitted a revised filing request that was consistent with the rate the Superintendent specified that she would approve. As a result, on May 19, 2009, the Superintendent issued a Decision and Order approving Anthem's revised filing. Because the interplay of the May 18th and the May 19th Decisions and Orders was

not addressed by the parties in their memoranda or at oral argument, the court directed them to file supplemental memoranda addressing three questions.[1] *See* Order to File Supplemental Memoranda, dated April 6, 2010. The parties timely filed a Joint Statement in which, among other things, they agreed

> that the May 19, 2009 Decision and Order affirms, subsumes, and incorporates the May 18, 2009 Decision and Order. See 24-A M.R.S. § 235(4). The two orders were issued in the same docket (INS-09-1000), and by incorporation the Superintendent found in her May 19th Decision and Order that Anthem's compliance filing was consistent with the May 18th Decision and Order. The actions taken by the Superintendent in her May 18th and May 19th Decisions and Orders are one integral whole. For these reasons neither the Superintendent nor the Attorney General contests Anthem's ability to appeal the substance of the May 18, 2009 Decision and Order in this case.

Joint Statement at ¶ 1. Hereafter, unless specified otherwise in this Order on 80C Appeal, all references to the Superintendent's "Decision" or "Decision and Order" shall be to her May 18th Decision and Order.

To be clear, Anthem only appeals that portion of the Superintendent's Decision specifying and approving as adequate a 0% profit and risk margin for the year 2009.[2]

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[1] The court's order asked the parties to address the following questions:

1. Does the Superintendent's May 19, 2009 Decision and Order render the May 18, 2009 Decision and Order moot?
2. Do the parties agree that the final agency decision on appeal in this case is not the Superintendent's denial of Anthem's December 22, 2009 revised rate request, but is, instead, that portion of the May 18, 2009 Decision and Order in which the Superintendent specifies the revised rate filing she would approve, including her specification that she would approve a profit and loss margin of 0%?
3. Does the Superintendent's specification in the May 18, 2009 Decision and Order of the revised rate filing that she would approve constitute final agency action that is properly before the court in this appeal?

Order to File Supplemental Memoranda, dated April 6, 2010.

[2] *See* ¶ 2 of the Joint Statement filed by the parties on April 13, 2010 in response to this court's April 6, 2010 Order to File Supplemental Memoranda (hereinafter "Joint Statement").

BACKGROUND

A. Rate Filing Procedures and Administrative Hearing

Maine law requires that insurance carriers doing business in the State submit proposed premium rates for individual insurance products to the Superintendent of Insurance ("Superintendent") for review and approval. Specifically, 24-A M.R.S. § 2736(1) (2008) provides that "[e]very insurer shall file with the superintendent every rate, rating formula, classification of risks and every modification of any formula or classification that it proposes to use in connection with individual health insurance policies." *Id.* The Superintendent then reviews the filing "to determine whether [it] meets the requirements that rates not be excessive, inadequate or unfairly discriminatory . . .." *Id.* at § 2736(2).

On December 22, 2008, Anthem filed proposed revised rates for approval for its individual health insurance products, namely its HealthChoice, HealthChoice Standard, HealthChoice Basic, and Lumenos Consumer Directed Health Plan products. Record at 296 (hereinafter "R. at __"). On January 16, 2009, the Superintendent issued a Notice of Pending Proceeding and Hearing.[3] The notice set the public hearing for March 12, 2009. R. at 296.

On January 21, 2009, Anthem filed a revision to its initial filing. In early February 2009 Anthem provided direct written notice by mail to every affected policyholder, advising policyholders of the proposed rate increases, the pending proceedings, evening public comment sessions, and the scheduled hearing. *Id.* at 297. On February 10, 2009, as part of the Procedural Order issued by the Superintendent, the Maine Attorney General was allowed to intervene. *Id.* *See also* 24-A M.R.S. § 2736-A.

[3] 24-A M.R.S. § 2736-A provides: "If at any time the superintendent has reason to believe that a filing does not meet the requirements that rates not be excessive, inadequate, unfairly discriminatory or not in compliance with Section 6913 or that the filing violates any of the provisions of chapter 23, the superintendent shall cause a hearing to be held.

On March 3, 2009, in Orono, and on March 10, 2009, in Portland, the Superintendent held public comment sessions providing members of the public an opportunity to make either sworn or unsworn statements for her consideration. *Id.* Thirty-four individuals provided such statements. *Id.* On March 6, 2009, Anthem and the Attorney General pre-filed testimony and exhibits. Anthem's pre-filing included a revised rate increase request. *Id.*

On March 12, 2009, the Superintendent held a hearing on Anthem's filing. *Id.* at 298. The hearing was conducted in open session. Members of the public had an opportunity to make either sworn or unsworn statements for consideration by the Superintendent. Seventeen individuals provided such statements. *Id*. Members of the public also submitted in excess of three hundred (300) written comments outside the public hearing that the Superintendent designated as a part of the record. *Id.* According to the Superintendent's Decision and Order, she read each of the written submissions. *Id.* To the extent that they commented on facts that were in the record, she considered them for their persuasive value in the same manner as legal arguments and other comments submitted by the parties. *Id.* However, because the Maine Administrative Procedure Act bars her from relying on unsworn submissions as evidence, she did not treat them as such. *See id.* (citing 5 M.R.S. § 9057).

At the hearing, Anthem presented testimonial evidence from Jennie Casaday, Associate Actuary; Vincent Liscomb, Executive Director of Provider Network Management; and George Siriotis, Regional Vice-President of Sales for the Individual Markets Division, East Region. The Attorney General presented testimonial evidence from Beth Fritchen, Actuary and Principal with Oliver Wyman Actuarial Consulting, Inc. *Id.* Following the hearing, the Superintendent accepted post-hearing submissions from Anthem and the Attorney General. *Id.* at 299.

B. Anthem's Rate Filing Requests for 2009

In its initial filing, Anthem proposed revised rates for its individual products that it asserted would produce an average increase of 14.5%. *Id.* at 295. The underlying premium increases varied depending on deductible level and type of contract. The largest increase for the Non-Mandated HealthChoice options would have been 17.2%, for the Mandated Options (HealthChoice Standard and Basic) 7.7%, and for Lumenos, 34.1%.

Anthem originally requested that those rates become effective on May 1, 2009, then revised its actuarial analysis with updated data reflecting a July 1, 2009 effective date. *Id.* Based on its revised analysis, Anthem requested approval of updated revised rates with an average increase of 18.1%. *Id.* The largest premium increase for Non-Mandated HealthChoice would have been 23.6%, for Mandated HealthChoice would have been 9.5%, and for Lumenos would have been 37.8%.

In its pre-filed testimony submitted on March 6, 2009, Anthem further revised its analysis and requested a further updated average rate increase of 18.5%. *Id.* For the Non-Mandated HealthChoice options, the range of increases is 8.7% to 24.5%, with an average of 18.7%. *Id.* For the Mandated HealthChoice options, the range of increases is 9.0% to 9.7%, with an average of 9.2%. For the Lumenos options, the range of increases is 8.9% to 38.4%, with an average of 30.2%. Anthem requested that this revised rate filing become effective on July 1, 2009.

As of November 2008 there were 12,049 policyholders who would have been affected by the proposed rate revisions.

C. Superintendent's Decision

In her May 18th Decision and Order, the Superintendent denied Anthem's request for an 18.5% average rate increase based on her conclusion that portions of the rate were excessive and

unfairly discriminatory. R. 311-12 & 314. However, she did not find that the requested rate increase was inadequate. As required by law, the Superintendent specified the revised filing that she would approve, resulting in an average rate increase of 10.9%. R. at 312-13; see 24-A M.R.S. § 2736-B. In so doing, she concluded that the lower revised rates, as specified by her, would not be excessive, inadequate, or unfairly discriminatory. *Id.* at 313.

Rejecting Anthem's rate filing request, the Superintendent observed that Anthem included a 3% pre-tax profit and risk margin in its rate development based on prior rate approvals and asserted that a 5% margin would be justified. R. at 311.

> Anthem repeatedly cited losses on its individual products over the last four years as evidence that a 3% margin is inadequate to cover the risks associated with these products. However, those losses are entirely attributable to 2005 and 2006. As shown in Exhibit 9 of the filing, for the nine years Anthem has owned the company (2000-2008),[4] these two years were the only ones that showed a loss. The pre-tax gain was 5.3% in 2007 and 2.8% in 2008. Over the nine-year period, the pre-tax operating gain totaled nearly $[17.4][5] million and averaged 3.2% of total revenue.

Id.

The Superintendent went on to conclude that a 0% profit and risk margin for the year 2009 was reasonable under the circumstances:

> The Attorney General recommended allowing no margin, citing "(1) a unique economic situation resulting in extreme financial hardship for subscribers, and (2) the extreme financial health of the company." The large number of policyholders who testified at the public hearings and sent written comments provides ample evidence of the first point and Anthem's financial statements provide ample evidence of the second. Under these circumstances, it is reasonable to allow no profit and risk margin this year. While a break-even rate would not contribute further to the company's surplus, it would not be a drain either. Furthermore, the existence of the individual line would continue to provide an indirect benefit to

[4] Anthem owned the company for only part of the year 2000.

[5] Although the Superintendent asserted that Anthem experienced a pre-tax operating gain of $16 million, the Superintendent asserts that that calculation was in error and the correct figure is $17.4 million. Anthem has not disputed this assertion.

> the company because it provides a larger base over which to spread fixed expenses.

R. at 311.

Thereafter, on May 19, 2009, Anthem submitted and the Superintendent approved a revised rate filing that was consistent with the rate specified by the Superintendent in her May 18th Decision and Order.

In this appeal, Anthem does not challenge the Superintendent's denial of its request for a 3% profit and risk margin in its 2009 rates nor does it appeal any other portion of her denial. Joint Statement at ¶ 2. Rather, Anthem has only appealed that portion of the Superintendent's Decision approving a 0% profit and risk margin for the year 2009, and her conclusion that such a margin is not "inadequate."

DISCUSSION

In an appeal of final agency action brought pursuant to M.R. Civ. P. 80C, this court reviews "the agency's decision for errors of law, abuse of discretion, or findings not supported by substantial evidence in the record." *Beauchene v. Dep't of Health & Human Servs.*, 2009 ME 24, ¶ 11, 965 A.2d 866, 870 (quotation marks omitted); *see also Seider v. Bd. of Exam'rs of Psychologists*, 2000 ME 206, ¶ 8, 762 A.2d 551, 555.

When reviewing "an agency's interpretation of a statute that is both administered by the agency and within the agency's expertise, [courts] apply a two-part inquiry." *Dep't of Corr. v. PUC*, 2009 ME 40, ¶ 8, 968 A.2d 1047, 1050 (*quoting Competitive Energy Servs. LLC v. Pub. Utils. Comm'n,* 2003 ME 12, ¶ 15, 818 A.2d 1039, 1046). The "first inquiry is to determine de novo whether the statute is ambiguous. An ambiguous statute has language that is reasonably susceptible of different interpretations." *Id.* (citations and quotation marks omitted). Second, the court either reviews the agency's "construction of the ambiguous statute for reasonableness or

plainly construe[s] the unambiguous statute." *Id*. This court will "accord 'great deference' to the [agency's] interpretation if the statute is considered ambiguous, but will apply a different interpretation if 'the statute plainly compels a contrary result.'" *Id*. (quotation marks omitted).

I. Overview of Parties' Arguments on Appeal

As noted above, Anthem has clarified that the basis for its appeal in this case is not the Superintendent's denial of its December 22, 2008 rate filing, as revised. Rather, it appeals that portion of the Superintendent's May 18th Decision and Order in which she specifies that she would approve a revised rate that includes a profit and risk margin of 0%.[6]

According to Anthem, a 0% profit and risk margin is "inadequate" and therefore violates Section 2736. The insurer argues that the Superintendent misconstrued the purpose of the "adequacy" requirement under the statute and of the interplay between the three-pronged analysis required under Section 2736 (i.e., that the proposed rate not be excessive, inadequate or unfairly discriminatory). On the one hand, Anthem contends, the "excessive" analysis protects consumers by ensuring that rates are not unreasonably high, while the "adequacy" standard is intended to safeguard an insurer's ability to receive sufficient premiums to cover costs, to provide a reasonable margin to cover unanticipated risks *and* to contribute to the surplus of the carrier.

Anthem further asserts that the "the concept of adequacy in existing Maine law must be determined in the context of the particular product line's performance and contribution to surplus, not on the overall financial health of the Company." Anthem Br. at 9. Therefore, according to Anthem, the Superintendent's reliance on the fiscal health of Anthem and its parent

[6] Pursuant to 24-A M.R.S. § 2736-B, "[i]f the superintendent disapproves the rate filing, the superintendent shall establish the date on which the filing is no longer effective, specify the filing the superintendent would approve and authorize the insurer to submit a new filing in accordance with the terms of the order or decision."

company was improper and the scope of her inquiry should have been limited solely to the performance of the individual product line.

Anthem cites testimony given by the Superintendent in April 2009 in connection with the Legislature's consideration of L.D. 1205 and its contemplated amendment of Section 2736. According to Anthem, the Superintendent's testimony offered an interpretation of Section 2736 that is contrary to her application of the statute in this case. Anthem also notes that Section 2736, on its face, regulates only individual insurance products such that any profit and risk analysis under that section should also be limited to the performance of individual insurance products. Additionally, Anthem takes issue with the Superintendent's alleged consideration of unsworn testimony in making her determination, which Anthem notes is a violation of the Administrative Procedure Act. Finally, Anthem argues that the Superintendent's approval of a 0% profit and risk margin is discriminatory and violates Anthem's right to due process and equal protection as guaranteed by the 14th Amendment to the United States Constitution and the Maine Constitution.

In response, the Superintendent[7] contends that the requirement in Section 2736 that insurance rates not be "inadequate" does not, as Anthem urges, guarantee insurers the right to achieve a profit. Rather than protecting the insurer's interest in contributing to its surplus, the Superintendent contends that the "adequacy" criterion is really a "solvency" standard aimed at protecting insureds by requiring that rates be sufficient to keep insurance companies solvent and able to cover all claims and losses. The Superintendent further asserts that nothing in Section 2736 can be construed to require her to approve a rate that contributes to an insurer's surplus or to limit her inquiry to the financial performance of a single product line rather than the financial

[7] The Attorney General has joined in the arguments raised by the Superintendent but did not file a separate brief.

health of the insurer as a whole. Finally, according to the Superintendent, because she had a rational basis for specifying a 0% profit and risk margin and because Anthem is not similarly situated to other individual insurance providers in the State, Anthem's equal protection argument fails as a matter of law.

II. Scope of Court's Inquiry into Meaning of "Inadequacy" in 24-A M.R.S. § 2736

In line with Anthem's claim that the Superintendent erred when she concluded that a 0% profit and risk margin is not "inadequate", is its claim that she misconstrued the "adequacy" prong of Section 2736 to not only permit an analysis of the projected financial performance of an insurer's individual product line but also to permit consideration of the insurer's overall financial health, including other product lines.

The threshold question here, as in any case involving statutory construction, is whether the statute is ambiguous. *Dep't of Corr. v. PUC*, 2009 ME 40, ¶ 8, 968 A.2d 1047, 1050. In the absence of any ambiguity, the court accords no particular deference to an agency's interpretation of the statute but, rather, simply construes the unambiguous language of the statute. *Id.* Although Anthem asks this court to consider the Superintendent's purported interpretation of Section 2736 as outlined in her prior testimony before the Legislature in connection with L.D., 1205, as well as the Legislature's rejection of the proposed amendment to the statute, courts "do not look to legislative history or other extraneous aids to interpret a statute when the plain language of the statute is unambiguous." *Windham Land Trust v. Jeffords*, 2009 ME 29, ¶ 12, 967 A.2d 690, 695 (citations omitted). Accordingly, before this court may look to sources other

than the statute itself to aid its review of this case, it must first determine whether Section 2736 and, more particularly, the term "inadequate" as it is used in that section, is ambiguous.[8]

A statute is ambiguous when it is *reasonably* susceptible of different interpretations. *Dep't of Corr. v. PUC*, 2009 ME 40, ¶ 8, 968 A.2d at 1050. At oral argument, counsel for both Anthem and the Superintendent argued that Section 2736 is unambiguous. However, in doing so, they offered divergent definitions of the term "inadequate" and explanations of its purpose. As noted, Anthem contends that the adequacy standard necessarily requires that a reasonable profit be built into every insurance rate while the Superintendent contends that the "adequacy" requirement relates only to an insurer's ability to remain solvent and cover all risks.

Despite the parties' distinct interpretations of the term "inadequate" in Section 2736, the court concludes that the statute is not ambiguous because only one of the proffered interpretations is facially and contextually reasonable. As the State notes, "adequacy", as that term is typically used, relates to whether something is "satisfactory," "suitable" or "sufficient." *See* Superintendent's Br. at 23-24 (citing American Heritage Dictionary p. 649 (2nd college ed. 1982)).[9] In a definitional sense, the meaning of that term is not unclear or controversial. However, "adequacy" and "inadequacy" are relative terms and necessarily require reference or comparison to some other factor. That is, the question of whether something is "adequate" or "inadequate" necessarily begs a follow-up inquiry, namely "adequate or inadequate as to what?"

A review both of the interplay of the "excessive, inadequate, or unfairly discriminatory" prongs of the Section 2736 standard itself as well as of the broad statutory scheme outlined in

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8 The term "inadequate" is not defined in Title 24-A, Chapter 33, the portion of the Insurance Code governing health insurance contracts generally and in which the sections governing individual insurance policies appear. The terms "excessive" or "unfairly discriminatory" also are not defined in Chapter 33.

9 *See also* http://www.merriam-webster.com/dictionary/adequate (defining "adequate" to mean, *inter alia*, "sufficient for a specific requirement," "barely sufficient or satisfactory" and "awfully and reasonably sufficient for a specific requirement") (last visited April 14, 2010).

Maine's Insurance Code lend clarity to the meaning of "inadequate." Such a statutory review supports the Superintendent's contention that the measure of adequacy is the ability of a rate to sustain projected losses and expenses and not, as Anthem contends, to ensure an additional contribution to an insurer's profit.

"Every statute must be construed in connection with the whole system of which it forms a part and all legislation on the same subject matter must be viewed in its overall entirety in order to reach an harmonious result which we presume the Legislature intended.". *Finks v. Maine State Highway Comm'n*, 328 A.2d 791, 795 (Me. 1974). *See also Finks*, 328 A.2d at 798 ("Absent a legislative definition, [statutory terms] must be given a meaning consistent with the overall statutory context, and be construed in the light of the subject matter, the purpose of the statute, the occasion and necessity for the law, and the consequences of a particular interpretation."); and *Blanchard v. Dep't of Transp.*, 2002 ME 96, ¶ 21, 798 A.2d 1119, 1125.

From this premise, the court first notes that the requirement in Section 2736 that a rate filing "not be excessive, inadequate or unfairly discriminatory" is a standard that is repeated throughout the Insurance Code. *See e.g.* 24-A M.R.S. §§ 2301, 2303, 2325(2)(B), 2381-A, 2382, 2382-E, 2384-A, 2933, & 3714(2). Although the court recognizes that other provisions in the Code articulating that identical standard are not directly applicable to a rate review for health insurance or individual insurance products, they are helpful in the court's analysis because they illustrate and illuminate the standard by which regulated insurance rates are reviewed in Maine, and by which individual plan rates are measured under Section 2736.

Significantly, 24-A M.R.S. § 2382, which outlines rating standards for workers' compensation insurance, expressly defines the terms "excessive," "inadequate" and "unfairly discriminatory." Under that section,

> A rate is not inadequate *unless insufficient to sustain projected losses and expenses* and the use of the rate has had a tendency to create a monopoly or, if continued, will tend to create a monopoly in the market *or will cause serious financial harm to the insurer*.

Id. (emphasis added). This rating standard, though not directly applicable, supports the Superintendent's assertion that "adequacy" relates to the ability of a rate to sustain an insured's expenses and risks for the purposes of protecting policyholders from the possibility that an insolvent insurance company will be unable to meet its obligations to its insureds for failure to charge an "adequate" rate.

Secondly, pursuant to her authority under the Uniform Health Policy Provision Law, of which Section 2736 is a part, the Superintendent has mandated that any insurer, including Anthem, providing individual health plans in Maine offer at least two standardized health plans. *See* 24-A M.R.S. § 2736-C(8); and Me. Dep't of Prof'l & Fin. Regulation 02 031 CMR 750-5. In the regulations governing those standardized plans there are minimum benefit requirements including, for example, a requirement that certain deductibles be available and that certain enumerated services be covered. *See* Me. Dep't of Prof'l & Fin. Regulation 02 031 CMR 750-5(a)(4). It would seem to follow that if an insurer is required to provide a certain baseline of coverage and benefits then it must also ensure that it has sufficient funds available to pay for them.

In the court's view, the meaning ascribed to "inadequate" elsewhere in the Insurance Code, together with the fact that the Uniform Health Policy Provision Law and the Superintendent's own Rules, expressly contains minimum coverage requirements and supports the following construction of the standard outlined in Section 2736: An insurer may charge

whatever rate it deems appropriate, so long as that rate complies with statutory requirements[10] and is not, in the Superintendent's discretion, "excessive." However, the rate must also be "adequate" to meet the basic requirements outlined in the statute relating, for example, to minimum required benefits within the mandated plans, and to otherwise permit the company to cover its risk.

In other words, under the general statutory scheme and the plain language of Section 2736, the only reasonable interpretation of the "adequacy" requirement is that it relates to the ability of a rate to sustain projected losses and expenses such that the insurer can meet its obligations vis-à-vis its insureds. It does not, however, expressly entitle insurers to a mandated profit margin.

While it is neither unreasonable,[11] nor prohibited by the Insurance Code for a private insurer to incorporate a reasonable profit into its proposed rates,[12] nothing in Section 2736 or in Title 24-A, Chapter 33 provides that a rate is "inadequate" if it is sufficient to cover projected losses but fails to include a reasonable profit. Further, while Anthem may point to the Superintendent's rate approvals in prior years as providing precedential support for the argument that a 3% profit margin is reasonable and should be permitted for 2009, that argument is more appropriately directed at the Superintendent's conclusion that a 3% profit margin is "excessive," rather than her conclusion that 0% is not "inadequate." *See* 24-A M.R.S. § 2382(2)(B)

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[10] *See e.g.* 24-A M.R.S. § 2736-C(5) mandating at least a 65% loss ratio for any rate.

[11] For a discussion of Anthem's claimed constitutional entitlement to a reasonable profit, see the discussion in Section IV, below.

[12] Indeed, many of the other sections within the Insurance Code noted above expressly provide that due *consideration* may or, in some instances, must be given to profit and risk. *See e.g.* 24-A M.R.S. §§ 2303(C)(3) & 2382(5)(C). However, even in those sections that require the Superintendent to consider a reasonable profit when she reviews a proposed rate, there is no express mandate that a profit be allowed when it is deemed "excessive" under the definition of that term.

(explaining that residual rates in the workers' compensation context "are excessive if they are likely to produce a long-term profit that is unreasonably high for the insurance provided and for surplus requirements or if expenses are unreasonably high in relation to services rendered."). However, neither the Superintendent's conclusion that a 3% profit in 2009 is excessive nor her factual findings underpinning that conclusion are in issue in this appeal.

III. Consideration Of Anthem's Overall Financial Health

Having concluded that a 0% or "break even" profit margin is not "inadequate" as a matter of law, what remains for the court to decide is whether it was improper for the Superintendent to rely on the existence of surpluses from Anthem's other lines of insurance to cover any potential losses suffered by Anthem when she concluded that the rate she approved is adequate. Here again, the court concludes that the Superintendent's decision did not violation Section 2736.

Nothing in the plain language of the statute expressly limits the scope of the Superintendent's inquiry into the adequacy of a particular rate to the performance of related individual insurance products. Although Anthem contends that such a restriction is implicit in the fact that Section 2736 applies only to individual policies and not to group plans, the court disagrees, for two reasons. First, the court declines to read into the statute a restriction on the information the Superintendent may consult in the exercise of her discretion when that restriction does not appear in the express language of the statute.

Second, the court does not agree that because Section 2736 relates only to individual health products it necessarily follows that other information is therefore categorically irrelevant or off limits. This is particularly true given the broad scope of the Superintendent's review under other sections of the Code. For example, under Section 2382, which relates solely to workers' compensation plans, the Superintendent is permitted to consider the financial performance of

insurance products sold both in Maine and outside of Maine when determining whether a rate is "excessive, inadequate or unfairly discriminatory." 24-A M.R.S. § 2382(5). *See also* 24-A M.R.S. § 2303.

Again, although the court recognizes that neither Section 2382 nor the other sections within the Code to which the court has referred are directly applicable to individual plans or to the rating analysis undertaken under Section 2736, the meaning those sections ascribe to the statutory terms at issue serves to support the Superintendent's construction of the same terms in this case. The court will not assume that the Legislature intended to mandate a minimum profit or proscribe consideration of information the Superintendent may consider illustrative to her analysis in one section of the Code where it did not do so expressly and where such inquiry has been deemed relevant to the "not excessive, inadequate or unfairly discriminatory" requirement in other sections employing that same standard.

In light of the foregoing, the court concludes that the Superintendent did not violate Section 2736 when she concluded that a 0% profit and risk margin for Anthem's individual health plans in the year 2009 is not "inadequate" based, in part, on Anthem's overall financial health.[13]

Finally, although Anthem contends that the Superintendent inappropriately relied on unsworn statements from witnesses regarding the state of the economy and their concerns regarding the impact of rate increases such that her findings are not supported and are arbitrary and capricious, the court disagrees. First, according to the Superintendent's Decision, she expressly did not rely on unsworn submissions as evidence. R. at 298. Further, the record

[13] In light of the court's conclusion that Section 2736 is not ambiguous, it is precluded from considering the Superintendent's testimony before the legislature to aid its decision in this case. Accordingly, the court does not reach Anthem's argument that the Superintendent's interpretation of the statute in this case unreasonably differs from prior interpretations.

reflects several sworn statements given by members of the public that support her findings regarding the impact of rate increases on policyholders as well as her findings regarding the more general state of the economy. *See e.g.* R. at 12-14-1220. These statements constitute substantial and permissible evidence supporting the Superintendent's findings.

IV. Anthem's Constitutional Claims

Anthem contends that the Superintendent's interpretation and application of Section 2736 in this case violates the Due Process and Equal Protection clauses of the United States Constitution and the Maine Constitution. U.S. Const., amend. XIV; Me. Const. art. 1, § 6-A. *See also* 5 M.R.S. § 11007(4)(C)(1) (explaining that, on judicial review, a court may reverse an administrative decision if it is "[i]n violation of constitutional or statutory provisions").

With respect to Anthem's equal protection challenge, the parties agree that Anthem is not a member of a protected class and that this court may review the Superintendent's actions under the rational basis standard, so-called. The United States Supreme Court has previously explained that, under the rational basis standard, "the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger v. Hahn*, 505 U.S. 1, 22-12 (1992)).

The guarantee of equal protection under the Maine Constitution is coextensive with the federal guarantee, and Maine courts employ a similar rational basis analysis. *Sch. Admin. Dist. No. 1 v. Comm'r Dep't of Educ.*, 659 A.2d 854 (Me. 1995). Where there is no suspect class or fundamental right at issue, "different treatment accorded to similarly situated persons need only be rationally related to a legitimate state interest." *Id.* at 857.

In support of its equal protection argument, Anthem points to the Superintendent's approval of a 3% pre-tax profit for the Mega Life and Health Insurance Company ("Mega Life") for its 2009 individual rates. *See* Anthem's Br. at 16 (citing Bureau of Ins. Docket No. INS-08-1000). In addition, Anthem contends that, following the Superintendent's approval of a 0% profit and risk margin, it is the only group insurer in Maine that is required to "subsidize" its individual insurance business. According to Anthem, "[e]ven if having lower insurance rates may be a legitimate state interest, there is no rational basis for singling out Anthem and treating it differently than other carriers in the market." Anthem's Br. at 16.

In opposition, the Superintendent contends that Anthem is not similarly situated to Mega Life or other group carriers in Maine because Anthem is the only carrier who provides both individual and group insurance policies, the surpluses of which are readily allocable to either line. Additionally, the Superintendent contends that even if Anthem is similarly situated to other carriers in Maine, her decision not to permit a profit and risk margin for Anthem in 2009 was rationally related to the legitimate governmental interest in protecting the interests of Anthem's "pool" of insureds who were experiencing significant economic pressures in addition to the rising costs of health insurance. Superintendent's Br. at 36-38.

After a review of the parties' arguments and of the record, the court concludes that Anthem has not demonstrated an equal protection violation here. First, distinct from the tax cases upon which Anthem relies,[14] the rating standard outlined in Section 2736 is not an established, fixed standard uniformly applied to all insurers in all years. As noted above, there is no minimum profit margin mandated under the statute. Instead, the "adequacy" or "inadequacy" of a particular rate is a heavily fact-driven inquiry. In the court's view, whether Mega Life and

[14] *See e.g. Verizon New England v. City of Rochester*, 940 A.2d 237 (N.H. 2007); and *MCI Telecommunications Corp. v. Limbach,* 625 N.E.2d 597 (Ohio, 1994).

Anthem are "similarly situated" such that they may be compared for the purposes of equal protection depends, at least in part, on the rate filings submitted by each company for the year 2009. However, the record in this case provides no basis upon which the court can engage in an educated comparison of the rate filing submitted by Mega Life with that submitted by Anthem in order to determine whether the rating formulas submitted by both companies are comparable or whether the Superintendent's findings with respect to both filings were similar. Barring such a comparison, the court is unable to analyze whether the Superintendent was unjustified when she approved a profit margin of 3% for one but not the other. Further, the court does not have information relating to Mega Life's overall financial health and the extent to which a 3% profit margin was necessary to render its rates "adequate" under the statutory standard discussed above. To the extent that Mega Life required a 3% profit and risk margin to ensure that it would be able to cover all expenses and losses while Anthem was expressly found not to require that margin, the two companies cannot be regarded as "similarly situated" for the purposes of the Superintendent's rate review.

Accordingly, the court cannot conclude that the Superintendent's application of Section 2736 in her decision violated Anthem's Equal Protection rights.

Finally, Anthem contends that the Superintendent's Decision violated its rights to due process.[15] Although not expressly articulated by Anthem, the court presumes that its characterization of the 0% profit margin as being a "confiscatory rate" relates to its "Due Process" challenge. *See* Complaint at ¶ 34. *See also Baltimore & Ohio R.R. Co. v. United States*, 345 U.S. 146, 148, 97 L. Ed. 912, 73 S. Ct. 592 (1953)). Further, although Anthem argues that the Superintendent's Decision resulted in a "Due Process" violation, its references to

[15] The Fifth Amendment, made applicable to the States by the Fourteenth Amendment, provides in part: "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const., amend V.

"confiscatory" rates may also invoke the "Takings Clause" and the court will address both points. *See Tenoco Oil Co. v. Dept. of Consumer Affairs*, 876 F.2d 1013 (1st Cir. 1989) (explaining the distinctions between the "Taking Clause" analysis and the "Due Process" analysis in the context of rate regulation). *See also Baltimore & Ohio R.R. Co.*, 345 U.S. at 148-49.

First, to the extent that Anthem argues that the 0% profit margin approved by the Superintendent deprived Anthem of a reasonable rate of return and thus constituted an unconstitutional "taking," the Supreme Court of the United States has previously held that so long as a regulation or rate does not cause a company "to lose money on its over-all business," it has not been deprived of its property "without just compensation." *Baltimore & Ohio R.R. Co.*, 345 U.S. at 148. Therefore, by virtue of the fact that the Superintendent considered Anthem's overall financial health and expressly found that the profit margin she approved would not cause Anthem to lose money overall, her decision in this case did not result in an unconstitutional taking or in the setting of a confiscatory rate. *See id.*

Second, to the extent Anthem contends that the rate approved by the Superintendent deprived it of property without due process of law, the Supreme Court has previously explained that "a regulation takes property without due process of law only if 'arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt. . . .'" *Tenoco Oil Co. v. Dept. of Consumer Affairs*, 876 F.2d 1013 (1st Cir. 1989) (quoting, *inter alia*, *Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988)). In this case, the court cannot conclude that the Superintendent's decision, which limited Anthem's ability to make a profit on its individual insurance plans in the year 2009 based upon her findings of fact and conclusions of law regarding the impact of a rate increase on policyholders, Anthem's overall financial health, and

her approval of other increases requested by Anthem for these lines was arbitrary, discriminatory or demonstrably irrelevant to the policies underlying Maine's Insurance Code generally and Chapter 33 specifically.

Based on the foregoing, and pursuant to M.R. Civ. P. Rule 79(a), the Clerk is directed to enter this Order on the Civil Docket by a notation incorporating it by reference and the entry is

> The Decision and Order of the Superintendent of Insurance, dated May 19, 2009, which subsumes and incorporates the Superintendent's Decision and Order, dated May 18, 2009, is AFFIRMED.

Date: April 21, 2010

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Chief Justice, Superior Court