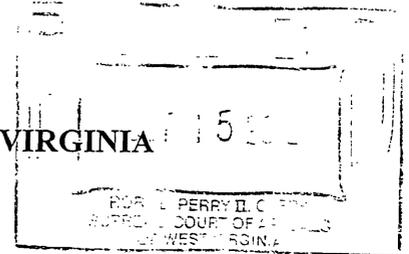


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0566



PAUL W. LIGHTNER,

PETITIONER,

v.

JANE L. CLINE, WEST VIRGINIA  
INSURANCE COMMISSIONER;  
CITIFINANCIAL, INC., and  
TRITON INSURANCE COMPANY,

RESPONDENTS.

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**BRIEF OF RESPONDENT, WEST VIRGINIA INSURANCE COMMISSIONER**

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## STATEMENT OF THE CASE

Respondent, Michael D. Riley<sup>1</sup>, duly appointed Insurance Commissioner of the State of West Virginia hereby submits a brief in response to Petitioner's Brief. The Insurance Commissioner herein responds that he fully and completely executed his legal authority under the West Virginia Code including recent interpretation of his duties by this Court including actions taken by his predecessor, Jane L. Cline. Petitioner, Lightner, after having been denied his requested relief in the Circuit Court of Marshall County was given direction concerning his claims and the authority of the Insurance Commissioner in *CitiFinancial v. Madden. State of West Virginia Ex Rel. CitiFinancial, Inc. v. The Honorable John T. Madden, Judge of the Circuit Court of Marshall County and Paul Lightner*, 223 W.Va. 229, 672 S.E.2d 365 (2008). Subsequent thereto, Petitioner filed an administrative complaint with the Offices of the Insurance Commissioner. Pursuant to the *CitiFinancial* ruling,<sup>2</sup> the Insurance Commissioner undertook his responsibilities and performed an examination and investigation concerning the matter. Under his authority as Insurance Commissioner, he determined through regulatory discretion that a hearing would serve no useful purpose as the matters in question were reviewed and approved appropriately fourteen years earlier. Additionally, upon further review, the Insurance Commissioner again upheld the filings as being properly approved under West Virginia law.

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<sup>1</sup> Jane L. Cline, Insurance Commissioner, retired on June 30, 2011. Michael D. Riley was appointed by Governor Earl Ray Tomblin with the advice and consent of the Senate as Acting Insurance Commissioner on July 1, 2011 and subsequently named Insurance Commissioner on January 9, 2012. See also W.Va. Code §33-2-1. For ease of reference, he will be referred to throughout Respondent's Brief although many of the actions were taken by his predecessor, Ms. Cline.

<sup>2</sup> Id.

While the West Virginia Code and Code of State Rules provide for a hearing *demand* by Petitioner, they do not require the same. A demand is not tantamount to a hearing right under administrative procedure. Nevertheless, upon review, the law of the State of West Virginia as it existed during the relevant era complained of should prevail. Petitioner was provided ample due process and multiple opportunities to prevent his position in multiple forums throughout the relevant proceedings. Respondent, Insurance Commissioner has followed existing statutory law, case law and regulatory discretion in handling this matter. The process was fair and produced the result that found that this was not the type of matter that should be decided by a consumer complaint but rather the Commissioner must investigate to ascertain his direct involvement in this matter. Petitioner seeks to have this Court, the Circuit Court of Kanawha County as well as the Insurance Commissioner legislate policy in regards to these matters in direct contravention of state case law and legislative authority. In the absence of legal authority and legislation or rules, Petitioner wants this Court to create a standard benchmark for insurer conduct in this regard.

Petitioner originally filed a class action in the Circuit Court of Marshall County wherein he sought damages under the West Virginia Consumer Credit Protection Act (W.Va. Code §46A-3-109 (1998) and §46A-5-101 (1996)). Additionally, Petitioner alleged excessive rates used by Respondents in insurance policy sales transactions. This Court in *State of West Virginia Ex Rel. CitiFinancial, Inc. v. The Honorable John T. Madden, Judge of the Circuit Court of Marshall County and Paul Lightner*, 223 W.Va. 229, 672 S.E.2d 365 (2008), issued a Writ of Prohibition preventing the Circuit Court from enforcing its order of May 6, 2008, through which then Petitioner/Respondent *sub*

*judice*, CitiFinancial, Inc.’s motion for partial summary judgment was denied by failing to dismiss claims asserted against then Petitioner/Respondent *sub judice*, CitiFinancial, Inc. by then Respondent/Petitioner *sub judice*, Paul W. Lightner for alleged unreasonable and excessive credit insurance charges. This Court found that insurance rate issues must essentially be brought before the Insurance Commissioner for his determination. The Court further declared that jurisdiction of the Insurance Commissioner was primary and not concurrent with Circuit Courts in rate matters. *Id.*

Subsequent to the above referenced case, the Petitioner *sub judice* filed his administrative complaint with the Offices of the West Virginia Insurance Commissioner on or about September 29, 2009, on behalf of himself and other policyholders concerning purchase of certain insurance policies known as “credit property” insurance and “credit involuntary unemployment” insurance.<sup>3</sup> Credit property insurance is defined as “a policy, endorsement, rider, binder, certificate or other instrument or evidence of insurance written in connection with a credit transaction that: a. Covers perils to the goods purchased through a credit transaction or used as collateral for a credit transaction and that concerns a creditor’s interest in the purchased goods or pledged collateral either in whole or in part; or b. Covers perils to goods purchased in connection with an open-end credit transaction.” W.Va. Code St. R. §114-61-2.6 (2003). Involuntary unemployment insurance (hereafter “IUI”) is generally defined as insurance covering a loss associated with inability to pay a debt subject to loss of employment involuntarily. Petitioner asserts that historically low loss ratios incurred by the Respondents when

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<sup>3</sup> It should be noted that a class action administrative complaint or contested case is not contemplated within the confines of the Administrative Procedures Act or the Insurance Code (*See* W.Va. Code §29A-1-1 et seq. or W.Va. Code §33-1-1 et seq.).

compared to projections in filings are indicative of excessive rates and therefore violate the West Virginia Code.

Petitioner sought a hearing pursuant to W.Va. Code §33-2-13 (1957), W.Va. Code §33-20-5(d) (1967), and W.Va. Code R. §114-13-1, *et seq.* (2003) on his administrative complaint for a period of time between **1994 to the present**. (A. 577). Petitioner sought an Order from the Commissioner withdrawing approval for the rate filings of Triton Insurance Company over the entire previously referenced period of over 14 years. (A. 577).

The Insurance Commissioner, who not only has hearing authority on these matters, has “continuing authority to disprove an insurance rate for noncompliance with the requirements of chapter thirty-three, article twenty.” *State of West Virginia Ex Rel. CitiFinancial, Inc. v. The Honorable John T. Madden, Judge of the Circuit Court of Marshall County and Paul Lightner*, 223 W.Va. 229, 236, 672 S.E.2d 365, 372 (2008). Consequently, the Insurance Commissioner undertook unilateral investigation and analysis **as permitted by law** of these allegations pursuant to his authority under W.Va. Code §33-2-3a (2007) and W.Va. Code §33-2-9 (2006). The Commissioner sought to ascertain relevant and pertinent facts to determine if he should take immediate action as opposed to holding an administrative hearing based upon the complexity of the issues, the challenges for the lay public to put forth effective arguments, the expertise of the Commissioner concerning these complex issues and the resources available to him for determination of these issues, for a just and clear resolution of the issues, and to make sure uniformity of judgment for all policyholders in the state occurs as opposed to a

singular administrative hearing result which may be inconsistent with the policyholder pool as a whole in the State of West Virginia.

The Commissioner reviewed the previous filings of the referenced company, data from the company for the referenced periods of time concerning their loss ratios, and all such investigative information submitted by Petitioner. (A. 574-1692). The Commissioner then had the information reviewed by an expert actuary in the field of credit insurance. (A. 516-527). Interestingly, Petitioner purchased data from the Hause firm in which they rely in this matter but did not use an actuary from the firm for this proceeding to opine upon their position. (A. 92-125). The Commissioner used a Hause actuary to opine upon the filings themselves. (A. 516-527).

The Insurance Commissioner found that Triton Insurance Company, an affiliate of CitiFinancial, Inc., engaged in underwriting and selling credit property insurance and credit involuntary unemployment insurance in the State of West Virginia. The Insurance Commissioner found that Triton Insurance Company, an affiliate of CitiFinancial, Inc., had written credit involuntary unemployment insurance in the State of West Virginia from a time period including 1994 to the present. The Insurance Commissioner found that Triton Insurance Company, an affiliate of CitiFinancial, Inc., had written credit personal property insurance in the State of West Virginia from a time period including 1994 until 2003. The Insurance Commissioner found that Triton Insurance Company, an affiliate of CitiFinancial, Inc., during the referenced time periods of the administrative complaint made approximately five (5) filings concerning the products referenced including three (3) filings of credit involuntary unemployment insurance and two (2) filings of credit personal property insurance. (A. 22-37).

The Commissioner went on to find that West Virginia had not adopted a benchmark minimum loss ratio rule concerning credit involuntary unemployment insurance during the period complained of by Petitioner. In fact, when a credit property rule was adopted from a National Association of Insurance Commissioners Model Rule (hereinafter “NAIC”), the Legislature did not adopt the involuntary unemployment insurance model which was also published at the time. The NAIC Model Rules are only suggested for adoption and many states do not adopt at all. These should not be regarded as “industry standards” but rather proposals for those states potentially experiencing problems with particular issues.<sup>4</sup> It should also be noted that the guidelines are ultimately amended and changed during most legislative processes such that the original model language rarely ends up being contained in final passage if it makes it that far in the process. *See NAIC Model Laws compendium. www.naic.org.*

The Insurance Commissioner found that Triton Insurance Company, an affiliate of CitiFinancial, Inc., made an involuntary unemployment filing on or about March 17, 1997 (Reference# 97030468) which was a single premium policy covering closed-end consumer loans. The terms of coverage were twelve (12) to sixty (60) months. The benefit period was four (4) to twelve (12) months depending upon the loan terms. The Insurance Commissioner found that the referenced March 17, 1997 filing of Triton Insurance Company, an affiliate of CitiFinancial, Inc., was reasonably complete and typical for this type of product filing. It was not unusual for companies filing nationwide programs to use nationwide data to support initial or subsequent rate filings or if state-wide experience lacks credibility. Credit involuntary unemployment experience varies significantly by many factors, not the least of which is underlying loan characteristics. For this reason, a program may be “new” in that existing programs may cover unrelated population or loan types. The Insurance Commissioner reviewed the rates in this referenced March 17, 1997 filing including seeking justification for the rates and initially disapproved them. After further information was obtained by the Insurance Commissioner, this filing was approved. The Credit Insurance Experience Exhibit data, in

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<sup>4</sup> The Insurance Commissioner is a member of the National Association of Insurance Commissioners (NAIC). Jane L. Cline, predecessor to Commissioner Riley was President of the organization in 2010 which sets not only national but in some instances international insurance policy.

particular, is of limited use due to aggregation of all of Triton Insurance Company's business based on premium and benefit type, regardless of individual program characteristics or experience. (A. 22-37).

Next, the Insurance Commissioner found that Triton Insurance Company, an affiliate of CitiFinancial, Inc., made an involuntary unemployment filing on or about February 16, 1999 (Reference# 99020395) which is a monthly premium loss of income and family leave product. The product was filed as a "new" program as its parameters of coverage and intended policyholders were different in that loans covered would be credit card indebtedness. The benefit period was twelve (12) to fifty-seven (57) months depending upon the minimum payment percentage. The premium components were very much in line with similar filings by this insurer and other insurers providing involuntary unemployment in states where the rate is not specified by law or regulation. Involuntary unemployment coverages on credit cards may exhibit different claim cost experience from consumer loans and these both may be different from larger, long term mortgage loans. The Insurance Commissioner, after review, approved the filing of February 16, 1999. (A. 22-37).

The Insurance Commissioner found that Triton Insurance Company, an affiliate of CitiFinancial, Inc., made an involuntary unemployment filing on or about February 26, 2001 (Reference# 151996) which was a monthly premium product and a new program from the prior referenced filing above of March 17, 1997 for closed-end consumer and mortgage loans. Terms of coverage were zero (0) to three hundred and sixty (360) months. Benefit periods were for four (4) to twenty-four (24) months depending upon loan term. The premium components were very much in line with similar filings by this insurer and other insurers providing involuntary unemployment in states where the rate is not specified by law or regulation. The program filed on or about February 26, 2001 was a longer term and higher loan amount program which is thought to have higher incidence rates than short-term consumer loans and consequently, rate equivalence may not infer similar experience. This filing of February 26, 2001 was approved by the Insurance Commissioner. (A. 22-37).

Next, the Insurance Commissioner found that Triton Insurance Company, an affiliate of CitiFinancial, Inc., made a credit property filing on or about January 19, 1996 (Reference# 96010578) for single premium dual interest credit property with a non-filing endorsement. Loans covered would be closed-end consumer loans. This was a new program. Terms of coverage were zero (0) to sixty (60) months. The filing referenced above of January 19, 1996 is complete and reasonable. Extensive justification was given for the investment income offset. It was not unreasonable to

use modified homeowners' loss statistics in a program that is new. To what extent actual experience varies from homeowners and in which direction depends on many variables, including location of the property insured. The premium components were very much in line with similar filings by this insurer and others insurers. Credit property and credit involuntary unemployment are potentially unstable products from an industry perspective in that there are years where losses are low, but the occurrence of economic uncertainty, recession and/or natural disaster may cause dramatic increases in loss ratios up to and exceeding 100%. The Insurance Commissioner initially questioned the rates as appearing high and received additional explanation from Triton to the extent that it satisfied the reviewer and the rate filing was approved. (A. 22-37).

The Commissioner additionally found that particular care should be exercised when attempting to derive applicable company experience from publicly available data. The Credit Insurance Experience Exhibit was changed in 2004 to split out the various types of programs that fall under the definition of credit property, so there is a necessary "break" in how companies report their data year-by-year. Further, there is discrepancy in how companies actually reported this data and under which line of authority which makes use of aggregate national data possibly unreliable. There are basic and fundamental differences between Credit Personal Property which is generally included at the time of financing and Creditor-Placed coverage which is added after the failure to maintain required coverage on financed automobiles or houses. (A. 22-37).

The Insurance Commissioner found that Triton Insurance Company, an affiliate of CitiFinancial, Inc., made a credit property filing on or about June 5, 2003 (Reference# 30606009) dealing with single premium dual interest credit property rate adjustment covering credit property forms included in the previously referenced filing on credit property reference number 96010578. Triton was questioned concerning their filing and their rate decrease request of 49.13%. The Insurance Commissioner thoroughly reviewed the filing and after extensive questioning, Triton withdrew the rate filing in its entirety. Triton discontinued the issuance of credit personal property insurance in the State of West Virginia on or about July 17, 2003. On or about July 31, 2003, W.Va. Code R. §114-61-1, *et seq.* (2003), which was previously adopted by the West Virginia Legislature, became effective for credit property insurance requiring a benchmark 60% loss ratio minimum. (A. 22-37).

A "loss ratio" is the relationship of incurred losses plus loss adjustment expenses to earned premiums. *See Dictionary of Insurance Terms*, 4<sup>th</sup> Ed., Barron's Business Guides, Harvey W. Rubin, Ph.D., CLU, CPCU (2000). Some loss ratios are higher than

100% which means the company is paying out more than they are receiving in premium dollars and are suffering a loss. Likewise, a lower loss ratio may represent profit being made on the product as a whole.

The Insurance Commissioner found that during the period contained in the Petitioner's administrative complaint, **Triton did not write credit property nor credit involuntary unemployment insurance wherein any rule was in effect concerning benchmark minimum loss ratio standards** for writing either product in the State of West Virginia. The Insurance Commissioner found that both parties were able to provide relevant information, data or other comment concerning their respective positions in the context of her investigation and analysis of these alleged violations to fulfill her duties under W. Va. Code §33-20-5(c) (1967). The Insurance Commissioner found that the filings made by Triton were complete and approved in a going forward basis at the time of filing. The Insurance Commissioner found that it is reasonable that a company may rely on an approved filing from the Insurance Commissioner in doing its business in the State of West Virginia. The Insurance Commissioner is aware of no duty placed upon insurers offering insurance as referenced in the Petitioner's administrative complaint to re-file rates once approved where there is no change in circumstances of the original filing. (A. 22-37).

The Petitioner has not alleged that the insurer, Triton Insurance Company, charged a rate to a consumer in excess of that approved by the Insurance Commissioner. Rates filed by insurance companies in other states are neither necessarily relevant nor dispositive as to what a rate should be in the State of West Virginia. Historically low loss ratios in relation to what is filed as anticipated loss ratios with the Insurance Commissioner concerning credit property and/or credit involuntary unemployment insurance written during the periods alleged in the Petitioner's administrative complaint and under existing parameters of law at those times do not by themselves constitute an excessive rate violation. There are many factors that affect actual experience under insured programs of credit involuntary unemployment and credit personal property. It is not unusual for a company to develop initial expected claims costs based on nationwide average data from available sources for a nationwide program. The claim ratios have been known to fluctuate widely from company to company, state to state and year to year. Due to this volatility, it is not unusual for initial claims costs estimates to be different from emerging experience. Some of this fluctuation is simply random. Specific factors such as geography, type of industry, economic cycle, amount of monthly payment, type of underlying loan and duration of coverage can affect claims costs for involuntary unemployment.

Specific factors such as covered perils, ancillary benefits, type of property covered, geography, location of property, type of lender and structure of underlying loan can affect claims costs for credit property. (A. 22-37).

The parties by mutual agreement and to allow the Insurance Commissioner more time to investigate and analyze the scope, complexity and remoteness of the administrative request, agreed on two separate occasions to continue the demand of the Complainant for a hearing and determined a final action date to be March 31, 2010 to trigger the requirements of W.Va. Code R. §114-13-1, *et seq.* (2003). There was no Writ of Mandamus filed against the Insurance Commissioner in regards to this matter.

Pursuant to W.Va. Code St. R. §114-13-3.3 (2003), a denial of a hearing requires the Commissioner to put forth in an order all such reasons for denial of the same. Therefore, pursuant to his findings in W.Va. Code §33-2-3a (2007) and W.Va. Code §33-2-9 (2006) inquiries, he stated in his Order the appropriate facts determined therefrom. (A. 22-37). Petitioner appealed the denial of the administrative hearing request to the Circuit Court of Kanawha County on or about May 5, 2010. (A. 38-511). By Order<sup>5</sup> dated March 26<sup>th</sup>, 2012, the Circuit Court of Kanawha County upheld the Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Complainant entered by the Insurance Commissioner on or about April 5, 2010. (A. 22-37).

### **SUMMARY OF ARGUMENT**

Petitioner's Brief appeals to this Court with a highly charged passionate, prejudicial and partiality type of argument. "In West Virginia, an appellate court will not set aside a jury verdict upon the claims that it is excessive, unless the verdict is monstrous and enormous, at first blush beyond all measure, unreasonable and outrageous, and such

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<sup>5</sup> (A. 1-21).

as manifestly shows jury **passion, partiality, prejudice**, or corruption.” Syl. Pt., *Addair v. Majestic Petroleum Co., Inc.*, 160 W.Va. 105, 232 S.E.2d 821 (1977).

While Petitioner wishes to paint with a wide and broad stroke the Insurance Commissioner’s Office as being accommodating of its regulated entities, “protecting its turf from intrusion via a citizen complaint” and trying to “insulate from scrutiny the Insurance Commissioner’s own bureaucratic failure in allowing West Virginians to be fleeced on a massive scale<sup>6</sup>,” the Petitioner fails to appreciate the many vital and important roles the Insurance Commissioner provides on a daily basis.<sup>7</sup>

Nevertheless, the Insurance Commissioner undertook appropriate review of the administrative complaint that was filed by Petitioner. Not only did he review the filings dating back some fourteen years, but he undertook new and thorough review of the same when the administrative complaint was filed. He further took the extraordinary step of obtaining actuarial justification of the filings using actuaries that produced the very

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<sup>6</sup> See *Petitioner’s Brief* at pg. 2

<sup>7</sup> It should be noted that the Insurance Commissioner of the State of West Virginia operates on a daily basis to obtain restitution for policyholders who have been harmed; handle consumer inquiries; consumer complaints; investigate and obtain convictions and restitution for victims of criminal insurance fraud; obtain civil restitution and penalties for victims of insurance misconduct; provide public outreach to insurance consumers; fine, suspend and/or revoke licenses of financial hazardous insurance companies who could harm consumers; fine, suspend and/or revoke licenses of agents or producers who have harmed consumers and or committed misconduct in their activities; audit and examine companies who operate in the State or who harm consumers in the State; transition workers’ compensation monopolistic system to a private market system; provide administrative hearings to consumers; handle insurance rate and form filings; process applications so that companies and agents can do business in the state; collect premium taxes that have assisted in funding obligations of the State of West Virginia; transition claims handling from bankrupt self-insureds; license and revoke third party administrator licenses; fine and/or enjoin employers who do not carry workers’ compensation insurance to protect its employees; pay benefits in Old Fund workers’ compensation residual claims to existing claimants; suggest legislation and rules to protect consumers of insurance transactions; provide public assistance during state emergencies declared by the Governor; risk manage state agency workers’ compensation insurance; operate the Uninsured Fund for claimants who are injured by uninsured employers; regulate Professional Employer Organizations; monitor Insurance Holding Company Systems for systemic failures; regulate self-insured employers for workers’ compensation administration and participate in multi-state collaborative enforcement actions among other duties. See e.g. *Insurance Commissioner’s Annual Reports, Insurance Commissioner’s Orders, other data and reports on the Insurance Commissioner’s website at [www.wvinsurance.gov](http://www.wvinsurance.gov), W.Va. Code Chapters 23 & 33, and W.Va. Code of St. R. §§85-1-1 et. seq. & 114-1-1, et seq.*

numbers that Petitioner seeks to rely upon. Having found no significant justification for a hearing, the same was denied. The Insurance Commissioner not only was justified and within the legal and constitutional confines of his authority, **the Circuit Court agreed with the Insurance Commissioner's handling of the matter.** (A. 21).

In a detailed and thorough Order consisting of over 21 pages, the Circuit Court of Kanawha County found the following,

The Court finds that [Petitioner's] petition should be denied and the Commissioner's April 5, 2010 Order **affirmed**. [Emphasis added] The Commissioner's findings, including that there was no rule in effect concerning benchmark minimum loss ratio standards for the products in West Virginia, that Triton's rate filings did not violate W.Va. Code §33-20-3 and that the rates charged were reasonable in relation that the benefits provided, should be accorded substantial deference and left undisturbed. They are supported by the record as a whole and are not erroneous, let alone clearly erroneous. More importantly, the findings originate from an extensive process which spans several months and consisted of review and analysis of thousands of pages of documents and data, including submissions by [Petitioner]. Simply stated, the Commissioner's April 5, 2010 Order was a result of **an exhaustive review** [Emphasis added] and one which fully comports with all legal requirements. This Court cannot and should not substitute its judgment for that of the Commissioner. *See Order Affirming Findings of Fact, Conclusions of Law and Final Order Denying Hearing Request of Complainant By the West Virginia Insurance Commissioner And Dismissing Appeal by Petitioner, Paul W. Lightner.* ¶22. (A. 10-11).

The Circuit Court of Kanawha County goes on to state that Petitioner “**fails to identify any evidence he was prevented from presenting to the Commissioner.**”

[Emphasis added] Nor does he identify what discovery he should have been permitted to conduct and how that would have affected the Commissioner's determination,

particularly in the fact of the extensive independent investigation conducted by the Commissioner.” Supra at ¶38 (A. 19).

Consequently, the Respondent, Insurance Commissioner, respectfully submits that proper legal process was initiated in the handling of this administrative complaint, that ample due process was provided to Petitioner, that the process was not acted upon in an unlawful procedure as demonstrated by appropriate statutes, rules and case law. The Respondent, Insurance Commissioner posits with this Court that his actions were not clear error of law, clearly wrong or arbitrary and capricious. Petitioner is espousing that a state agency, the Circuit Court and this Court legislate new policy in this regard. “It is not for this Court arbitrarily to read into [those statutes and regulations] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.” *Banker v. Banker*, 196 W.Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996). Cited in *Feathers v. W. Va. Bd. of Med.*, 211 W. Va. 96, 562 S.E.2d 488 (2001).

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

“If the Court, in its discretion, determines that the case presents an issue proper for consideration by oral argument under this Rule, the parties shall be notified by the Clerk. Cases suitable for Rule 20 argument include, but are not limited to: (1) cases involving issues of first impression; (2) cases involving issues of fundamental public importance; (3) cases involving constitutional questions regarding the validity of a statute, municipal ordinance, or court ruling; and (4) cases involving inconsistencies or conflicts among the decisions of lower tribunals.” W.Va. Rev. R. App. Proc. 20.

Respondent, the West Virginia Insurance Commissioner, believes due to the allegations

involved by Petitioner, the important statutory and legislative rules applicable as well as the importance of the issues themselves that a Rule 20 oral argument would be appropriate.

## ARGUMENT

### I. Standard of Review

“Upon judicial review of a contested case under this section, the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are: (1) In violation of constitutional or statutory provisions; (2) in excess of the statutory authority or jurisdiction of the agency; (3) made upon unlawful procedures; (4) affected by other error of law; (5) clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” *St. Mary's Hosp. v. State Health Planning & Dev. Agency*, 178 W. Va. 792, 364 S.E.2d 805 (1987) *Frank's Shoe Store v. West Virginia Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986) *Gino's Pizza of W. Hamlin, Inc. v. West Virginia Human Rights Comm'n*, 187 W. Va. 312, 418 S.E.2d 758 (1992) *Davis v. West Virginia Dep't of Motor Vehicles*, 187 W. Va. 402, 419 S.E.2d 470 (1992) “On appeal of an administrative order from a circuit court, the supreme court is bound by the statutory standards set forth in this section and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.” *Wheeling-*

*Pittsburgh Steel Corp. v. Rowing*, 205 W. Va. 286, 517 S.E.2d 763 (1999) *Genesis, Inc. v. Tax Comm'r*, 215 W. Va. 266, 599 S.E.2d 689 (2004) *Williams v. W. Va. Bd. of Exam'rs for Registered Prof'l Nurses*, 215 W. Va. 237, 599 S.E.2d 660 (2004).

As shown by the record and argument herein, the Commissioner has not violated any constitutional or statutory provision. The procedures used by the Commissioner were wholly lawful and within the parameters of his authority. Nothing that he has done in these matters is clearly wrong, affected by other error of law, arbitrary or capricious, and he has not abused his discretion but rather went above and beyond that required of his office. The Supreme Court of Appeals has decided many cases concerning review of administrative proceedings. There has been great deference given to administrative agencies in carrying out the policies and procedures of state government. "The commission's findings were sustained where its finding of discrimination was supported by substantial evidence and the circuit court exceeded the standard of review by substituting its judgment for that of the commission." *Bloss & Dillard, Inc. v. West Virginia Human Rights Comm'n*, 183 W. Va. 702, 398 S.E.2d 528 (1990).

"The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." *Stewart v. West Va. Bd. of Exmrs. for Registered Professional Nurses*, 197 W. Va. 386, 475 S.E.2d 478 (1996).

"Writ of prohibition was issued as a trial court exceeded its authority in reviewing contested cases under W. Va. Code § 29A-5-4 by essentially issuing a writ of mandamus and requiring the Commissioner of the West Virginia Division of Motor Vehicles to replace his procedural rules with new rules that were subject to the trial court's review;

just as W. Va. Code § 29A-5-4 did not authorize relief by way of an extraordinary writ, neither did it authorize the trial court to *sua sponte* order what was essentially extraordinary relief in its final order disposing of an administrative appeal.” *State Ex Rel. Cicchirillo v. Alsop*, 218 W. Va. 674, 629 S.E.2d 733 (2006).

“W. Va. Code § 29A-5-4 and prior case law unambiguously indicate that W. Va. Code § 29A-5-4 does not vest circuit courts reviewing administrative appeals of contested cases with the authority to order an agency to cease a certain practice or to direct an agency to promulgate new procedural rules that are subject to the circuit court's review; rather, a circuit court's disposition of an administrative appeal is limited to affirming, remanding, reversing, vacating, or modifying the agency's disposition of a contested case.” *Id.*

Thus, in addition to the recent decision of *CitiFinancial* (citation omitted), there is a long list of cases granting deference to administrative bodies.

**II. The Circuit Court Did Not Err in Upholding the Order of the Insurance Commissioner Denying a Hearing as Serving No Useful Purpose and Petitioner Did Not Have an Automatic Right to an Administrative Hearing Nor Was Denied Due Process of Law**

It is the clear contention of the Insurance Commissioner that he legally handled this administrative complaint within the confines of his legal authority and did not resort to irregularities in procedure but invoked known and clear statutory guidelines in his resolution of this matter.

The Appeal *sub judice* deals with a complex situation that affects multiple policyholders. **The Petitioner in his administrative complaint was seeking to set aside multiple rate filings filed some of which were nearly fourteen (14) years prior with**

the Offices of the Insurance Commissioner. The relevant code sections concerning disapproval of rates are contained in W.Va. Code § 33-20-5 (1967) which reads as follows:

§ 33-20-5. Disapproval of filings.

(c) If at any time subsequent to the applicable review period provided for in subsection (a) or (b) of this section, the *commissioner finds that a filing does not meet the requirements of this article, he shall*, [Italics added] after notice and hearing to every insurer and rating organization which made such filing, issue an order specifying in what respects he finds that such filing fails to meet the requirements of this article, and stating when, within a reasonable period thereafter, such filing shall be deemed no longer effective. Copies of said order shall be sent to every such insurer and rating organization. Said order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in said order.

(d) Any person or organization aggrieved with respect to any filing which is in effect may demand a hearing thereon. If, after such hearing, the commissioner finds that the filing does not meet the requirements of this article, he shall issue an order specifying in what respects he finds that such filing fails to meet the requirements of this article, and stating when, within a reasonable period thereafter, such filing shall be deemed no longer effective. Said order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in said order.

Consequently, there is a precursor section involving the Commissioner's authority before the analysis begins in W.Va. Code §33-2-5(d) (1967). The Insurance Commissioner has several duties. In many contested cases, he may grant or deny hearings on matters and act as a quasi-judicial tribunal. *See* W.Va. Code §33-11-4a, W.Va. Code §33-2-13, W.Va. Code St. R. §114-76-1, *et seq.* and W.Va. Code St. R. §114-13-1, *et seq.* In other enforcement matters, he is the direct prosecutor of potential civil violations of code among many of his offices such as in the findings from a market conduct or financial examination. *See* W.Va. Code §33-2-9. The Commissioner also has authority to coordinate with state prosecuting attorneys and U.S. Attorneys to prosecute instances of insurance fraud. *See* W.Va. Code §33-41-1, *et seq.*

It is the position of the Insurance Commissioner that once an administrative complaint that has broad perspective has been thoroughly investigated or examined by his Office, a W.Va. Code §33-2-5(d) (1967) administrative hearing generally may not serve a useful purpose as he may take direct action against the entity or deny the same as having no merit within the parameters of his authority. Allowing consumers and respondents to argue such broader market issues would in essence be “abdicating” the Commissioner’s responsibility. The understanding of the insurance market as a whole, a broad understanding of rate and form issues, the expertise of the staff of the Commissioner’s Office and the public policy ramifications of such issues calls for the Commissioner’s determination of these matters and not simply leave disposition to the parties to sort out.

This Court determined in *State ex rel. CitiFinancial v. Madden* that “the Legislature did not authorize the circuit courts to invade the jurisdiction of the Insurance Commissioner and conduct a re-examination of insurance rates previously approved by the Commissioner. *State of West Virginia Ex Rel. CitiFinancial, Inc. v. The Honorable John T. Madden, Judge of the Circuit Court of Marshall County and Paul Lightner*, 223 W.Va. 229, 672 S.E.2d 365 (2008).

Further, this Court stated that, “[i]t stands to reason that if a circuit court is allowed to invade this administrative arena and reexamine the issue of whether a given insurance rate is reasonable or excessive, the judiciary will necessarily be substituting its determinations as to the permissible insurance rates for those previously determined by the Commissioner and supplanting its opinion in matters expressly delegated to the Commissioner’s expertise and jurisdiction.” *Id.* at 237, 373. This Court additionally discussed, “[a] further peril that cannot be overlooked is that judicial intervention in the

rate making area would open the door to conflicting decisions amongst the various circuits regarding what constitutes an unreasonable or excessive charge for credit insurance. In this matter then, the uniformity of regulation that the Legislature has established by delegating all matters involving rate making and rate filings to the Commissioner is certain to be infringed if circuit courts or jurors are permitted to second guess the reasonableness of rates previously approved by the Commissioner.” Id.

Therefore, the West Virginia Supreme Court of Appeals has in fact posited this authority with the Insurance Commissioner as previously bestowed by the Legislature. The Commissioner has continually fulfilled his duties within the parameters of the referenced code sections and his findings and Order are consistent with the ruling referenced in *CitiFinancial v. Madden*. Id. Further, as this Court has stated, the matter must be “raised” with the Insurance Commissioner which is precisely what the Petitioner did in this instance and the Commissioner acted accordingly. Id. Obviously, the Petitioner does not agree with the Commissioner’s rate approval in this matter.

While Petitioner points to W.Va. Code §33-20-5(d) (1967) as being dispositive of the issues in this matter, an analysis must be completed of the entire section in *pari materia*. “Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments.” Syllabus Point 3, *Smith v. State Workmen's Compensation Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). “Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part,

provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly." Syllabus Point 5, *Freuhauf Corp. v. Huntington Moving and Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975). A precursor section to W.Va. Code §33-20-5(d) (1967), is inevitably W.Va. Code §33-20-5(c) (1967). W.Va. Code §33-20-5(c) (1967) states in its entirety the following:

(c) If at any time subsequent to the applicable review period provided for in subsection (a) or (b) of this section, the commissioner finds that a filing does not meet the requirements of this article, he shall, after notice and hearing to every insurer and rating organization which made such filing, issue an order specifying in what respects he finds that such filing fails to meet the requirements of this article, and stating when, within a reasonable period thereafter, such filing shall be deemed no longer effective. Copies of said order shall be sent to every such insurer and rating organization. Said order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in said order.

Consequently, it is contemplated within the section that the Insurance Commissioner has authority, on his own, to review filings and determine if a particular filing is not within the applicable statutory directives of West Virginia law as well as case law interpreting the same. It has been the policy of the Commissioner to make sure that any rate or form issue is corrected such that all policyholders and consumers in West Virginia are in fact protected. Therefore, the result sought to be obtained in a hearing under W.Va. Code §33-20-5(d) (1967) might lead to an incomplete, inconsistent and/or unfair result for the entire marketplace or leave other consumers or policyholders unresolved concerning their affairs. Consequently, one must get past an analysis in W.Va. Code §33-20-5(c) (1967) before ever needing to proceed with W.Va. Code §33-20-5(d) (1967). The Commissioner as discussed later herein this Brief performed his statutory duty on two separate occasions. The rates were in fact reviewed when filed. (A. 577-1131). Further, the Commissioner upon the filing of the Petitioner's Administrative

Complaint undertook a second evaluation of the rates in light of subsequent statutory changes and other legal precedent including the referenced *CitiFinancial v. Madden* decision. *State of West Virginia Ex Rel. CitiFinancial, Inc. v. The Honorable John T. Madden, Judge of the Circuit Court of Marshall County and Paul Lightner*, 223 W.Va. 229, 672 S.E.2d 365 (2008).

It would appear to be an unwarranted consequence of the statutory scheme passed by the West Virginia Legislature and the *CitiFinancial* (citation omitted) decision, to hold a hearing that would only involve a rate error between two private parties when the benefit of said hearing may only inure to those litigants and completely disregard the remaining consumers and policyholders in the State of West Virginia. When said analysis is performed and if undertaken in a comprehensive fashion and should the Commissioner not find evidence or facts that would lead him to take action on his own which he legally can do, it would appear that there would have to be sufficient evidence put forth to make any hearing in the matter useful or otherwise be a total waste of judicial economy and taxpayer funds. Consequently, a more reasoned approach to W.Va. Code §33-20-5 (1967) analysis would be that were the Commissioner to fail to perform a W.Va. Code §33-20-5(c) (1967) exam and/or analysis or in a particular matter take no position on it, then W.Va. Code §33-20-5(d) (1967) would in fact be a “backstop” for a single complainant to bring the issue to the attention of the Commissioner. However, it would appear since the complexity of the issues and the expertise involved, the Commissioner should handle such matters per *State of West Virginia Ex Rel. CitiFinancial, Inc. v. The Honorable John T. Madden, Judge of the Circuit Court of Marshall County and Paul Lightner*, 223 W.Va. 229, 672 S.E.2d 365 (2008) rendering a W.Va. Code §33-20-5(d)

hearing moot. A regulator has to have discretion in handling of its regulatory affairs.

“After all, the decision whether to proceed by rulemaking or adjudication lies within the **agency's discretion** [Emphasis added], and the Legislature imposed few restraints on the exercise of this discretion. In short, we are faced with an explicit delegation of authority without clear legislative guidance. In the absence of a persuasive argument the legislative rule is arbitrary and capricious, we defer to the regulation and HCCRA's application of it.” *West Virginia Health Care Cost Review Auth. v. Boone Mem. Hosp.*, 196 W. Va. 326, 339, 472 S.E.2d 411, 424 (1996).

Another consideration is the W.Va. Code §33-20-5(d) (1967) requirements are dealing with rate violations where a rate not properly filed nor approved or a rate properly filed and approved but not used by a company occurs. In those instances, the facts of the particular policyholder situation may be relevant to ascertain in a hearing whether a specific violation of the Code has occurred. However, in this instance there are absolutely no factual allegations that the Petitioner was charged a rate in excess of any rate so approved by the Insurance Commissioner. Therefore, again the Commissioner has exercised his lawful authority and the Petitioner is seeking relief from the Circuit Court in direct contravention of *State of West Virginia Ex Rel. CitiFinancial, Inc. v. The Honorable John T. Madden, Judge of the Circuit Court of Marshall County and Paul Lightner*, 223 W.Va. 229, 672 S.E.2d 365 (2008).

Finally, W.Va. Code §33-20-5(d) (1967) reads as follows:

(d) Any person or organization aggrieved with respect to any filing which is in effect may demand a hearing thereon. If, after such hearing, the commissioner finds that the filing does not meet the requirements of this article, he shall issue an order specifying in what respects he finds that such filing fails to meet the requirements of this article, and stating when, within a reasonable period thereafter, such filing shall be deemed no

longer effective. Said order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in said order.

A demand is simply a request and a request only. A demand for judgment is not always granted. It should, therefore, be noted that a hearing may be demanded but is not required nor made mandatory by the above referenced section especially when the Commissioner has undertaken substantive W.Va. Code §33-20-5(c) (1967) analysis, investigation and examination. The language of the referenced section is not mandatory and if the Legislature in their authority believed it should be as such, it could have inserted mandatory language.

W.Va. Code St. R. §114-13-1, *et seq.* (2003) is a procedurally adopted rule made effective on or about October 23, 2003 concerning the Commissioner's administrative hearing process. Petitioner's Administrative Complaint was filed on or after the effective date of W.Va. CSR §114-13-1 (2003). Under W.Va. Code R. §114-13-3.3 (2003), the following language is contained concerning an administrative hearing demanded.

Hearing on written demand. --When the commissioner is presented with a demand for a hearing as described in subsections 3.1 and 3.2 of this section, he or she shall conduct a hearing within forty-five (45) days of receipt by him or her of such written demand, unless postponed to a later date by mutual agreement. However, if the commissioner shall determine that the hearing demanded: a. Would involve an exercise of authority in excess of that available to him or her under law; or b. Would serve no useful purpose, the commissioner shall, within forty-five (45) days of receipt of such demand, enter an order refusing to grant the hearing as requested, incorporating therein his or her reasons for such refusal. Appeal may be taken from such order as provided in W.Va. Code §33-2-14.

The language in the rule clearly permits the Commissioner as a means of ferreting out non meritorious complaints to deny a hearing where it would serve no useful purpose. In the current instance, where the Commissioner has undertaken substantive W.Va. Code

§33-20-5(c) (1967) analysis, investigation and examination, additional hearing would serve no useful purpose. The Commissioner could obviously undertake his own administrative proceedings if he felt action needed to be taken and then take appropriate measures he deemed necessary as a result thereof.

While Petitioner argues that the actions of the Commissioner are not based upon correct legal procedure, he fails to discuss W.Va. Code §33-2-14 (1957). This code section deals with appeals of the Commissioner's Orders. The first line of that statute states "An appeal from the commissioner shall be taken from an order entered after hearing **or an order refusing a hearing** [Emphasis added]." *Id.* Consequently, this codification which has been in existence for a number of years clearly states on its face that an appeal can be taken from a hearing denial. Therefore, as early as 1957, it was contemplated by the Legislature that there would be instances where a hearing may be denied.

If the Insurance Commissioner cannot deny hearings when necessary per his own regulatory discretion, then he would be forced to hold countless hearings costing the taxpayers of this State additional funds for non-meritorious or frivolous endeavors that consume the State's resources and time which should be directed more appropriately to meritorious issues. The more proper way to handle these proceedings is precisely as the Commissioner did in the case *sub judice*. When tens of thousands of policyholders may be affected by the same or nearly same issue, and in absence of a class action mechanism for administrative proceedings, the Commissioner must handle on a macro level as opposed to a micro level.

West Virginia adopted a credit property rule dealing with benchmark loss ratios

on or about 2003. West Virginia has never adopted a benchmark loss ratio rule concerning involuntary unemployment insurance until recently. *See* W.Va. Code of St. R. §114-6-1, *et seq.* (Effective July 1, 2011.) Respondents, CitiFinancial and Triton stopped writing credit property insurance prior to West Virginia's adoption of said benchmarks. Consequently, there is no applicable standard in place with the exception of the general language in W.Va. Code §33-20-3 (2006) which reads as follows:

All rates shall be made in accordance with the following provisions:

**(a)** Due consideration shall be given to past and prospective loss experience within and outside this state, to catastrophe hazards, if any, to a reasonable margin for underwriting profit and contingencies, to dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members or subscribers, to past and prospective expenses both countrywide and those specially applicable to this state and to all other relevant factors within and outside this state.

**(b)** Rates may not be excessive, inadequate or unfairly discriminatory...

While the statute references "due consideration", this clearly evokes a discretion on behalf of the Commissioner in reviewing such information. Due to the population size of West Virginia, the competition of insurers and premium volume, the Commissioner must not solely rely on external data in coming to his conclusions as to filings.

As such, there is no definitive benchmark in place under the law to ascertain unreasonable profits as opposed to reasonable ones. Due process tends to state that before action can be taken against an entity, it should and must be apprised of the standards to which it has violated in order to rectify or correct such conduct. While Petitioner would argue he was denied due process in not being given a hearing, he would at the same time have the Commissioner violate the Respondents, CitiFinancial and Triton's due process by taking civil regulatory action against them for unspecified violations where the West Virginia Legislature has decided through action or inaction to not speak on these specific

issues during the relevant time period of the Administrative Complaint. “If, however, a particular policy is to be advanced in the creation of legislation or in the evaluative process, its genesis is properly within the chambers of the West Virginia Legislature, rather than the chambers of the Supreme Court of Appeals of West Virginia. Ftn.26 ‘A contrary result would be the epitome of legislating from the bench and would be a highly inappropriate exercise of powers of this Court.’” *State ex rel. Cooper v. Tennant*, 730 S.E.2d 368, 385 (2012).

Rate filings are somewhat speculative in nature and are indeed filed prospectively. Conditions concerning loss are cyclical. In years where the economy thrives, there obviously are less losses occasioned for claims of involuntary unemployment and those ratios will inevitably rise as unemployment rises and the economy takes a decided downturn. Profit taking in fairer years may lead to substantial losses in other years as mentioned. It is definitely a balancing test. It should also be noted that there is no benchmark or look back requirement for rates having already been filed and approved. It would appear that Petitioner is expounding this Court to adopt new procedures or law concerning these matters.

West Virginia adopted a credit property rule, W.Va. Code R. §114-61-1, *et seq.* (2003) made effective July 31, 2003. Among the relevant provisions contained therein was a benchmark credit property loss ratio that the company may not fall below:

6.2. Benefits provided by credit personal property insurance policies shall be reasonable in relation to the premium charged. This requirement is satisfied if the premium rate charged develops or may reasonably be expected to develop a loss ratio of not less than sixty percent or such other loss ratio as designated by the commissioner to afford a reasonable allowance for actual and expected loss experience including a reasonable catastrophe provision, general and administrative expenses, reasonable acquisition expenses, reasonable creditor compensation, investment

income, premium taxes, licenses, fees, assessments, and reasonable insurer profit.

CitiFinancial and Triton ceased writing credit property insurance in 2003 prior to the effective date of the rule which is undisputed. Consequently, from a period of sometime in 1994 until 2003, there simply was no applicable benchmark standard concerning credit property loss ratio benchmarks. The Commissioner obviously has to be concerned with acting arbitrary and capricious concerning denial of filed rates. As evidenced by the Appendix, the Commissioner performed his due diligence and questioned the rate filings but having received adequate documentation and explanation from the company, approved the rate filings (with the exception of the last and withdrawn filing) as not outside that being charged by other like companies doing business in the State for the particular parameters of the filings. (A. 577-1131). Additionally, it has been shown through the actual product filings that each of the filings were somewhat different products in nature and did not have any relevant experience to relate to the filings.

Interestingly, the Petitioner points to action taken by California, Arizona and Texas. What is not mentioned by Petitioner is that in each of those states before action was taken on referenced entities there was specific statutory benchmarks in place in one form or another.<sup>8</sup> Nevertheless, what other states are doing in these areas is not dispositive of the public policy of the State of West Virginia and attempts to impede the policy decisions of the Insurance Commissioner of West Virginia by use of other state law is precisely the type of deference the *CitiFinancial v. Madden* opinion discusses.

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<sup>8</sup> See Cal. Ins. Code §779.36; Cal. Code Regs. Title 10, §§2248 to 2248.14; 2249.1 to 2249.17 (1978/2006); Ariz. Admin. Code §20-6-604 (1983); Ariz. Rev. Stat. Ann. §20-1621 to 20-1621.11(2002); TX Admin. Code Title 28, Part I, Chapter 3, Subchapter FF, Division 3, Rule §3.5202; 3 Tex. Admin. Code §§5001 to 6011 (1980/2003); Bulletin B-0040-06.

*State of West Virginia Ex Rel. CitiFinancial, Inc. v. The Honorable John T. Madden, Judge of the Circuit Court of Marshall County and Paul Lightner*, 223 W.Va. 229, 672 S.E.2d 365 (2008). There was no existence of an involuntary unemployment rule benchmark in the State of West Virginia during or before the Administrative Complaint filed by Petitioner with the Insurance Commissioner. Consequently, Petitioner would have the Commissioner create an arbitrary standard where all evidence pointed to the legality of the rates as filed. In fact, legislative history reveals that the credit involuntary unemployment insurance component of the NAIC Model Rules on this matter was in fact not adopted at the same time the credit property rule was adopted.<sup>9</sup> This evidences the lack of will of the Legislature for establishing a benchmark loss ratio for credit IUI at that time.

The detailed facts as found in the Appendix demonstrate that the Insurance Commissioner at the time, reviewed all of the voluminous documentation concerning the filed rates, asked appropriate questions and approved the rates during the time frame in question in the normal course of agency business. Petitioner was provided ample due process in multiple forums concerning the facts contained in the Administrative Complaint. Therefore, for the above stated reasons, the Order of the Circuit Court affirming the administrative order of the Insurance Commissioner should be AFFIRMED.

**III. The Circuit Court Did Not Err in Upholding the Order of the Insurance Commissioner Denying Relief Sought in the Administrative Complaint As It Did Not Violate the Administrative Procedures Act and the Insurance Commissioner Is Entitled to Deference of its Actions Taken Pursuant to Lawful Legislative Enactments And Was Not Arbitrary And Capricious**

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<sup>9</sup> NAIC Model Rule 365 (2001) and Model Rule 370 (1960) .

The Commissioner fulfilled all of his statutory duties concerning this matter and the administrative complaint of Petitioner. The Commissioner undertook his own investigations and examinations as vested to him in the West Virginia Code to understand what had occurred in all of these instances concerning the conduct of Respondents, CitiFinancial and Triton in order to be sure that all policyholders and consumers of West Virginia were in fact protected if there were illegal rates allegedly being implemented by Respondents, CitiFinancial and Triton. His results showed that the filings were in order, approved in normal course of regulatory business, and a hindsight review confirmed the lack of illegality and/or impropriety in CitiFinancial or Triton's handling of the matters.

The Insurance Commissioner is vested with the legal authority to examine companies and their operations where necessary to ascertain their compliance with the law.

(a) The purpose of this section is to provide an effective and efficient system for examining the activities, operations, financial condition and affairs of all persons transacting the business of insurance in this state and all persons otherwise subject to the jurisdiction of the commissioner. The provisions of this section are intended to enable the commissioner to adopt a flexible system of examinations which directs resources as may be considered appropriate and necessary for the administration of the insurance and insurance-related laws of this state. W.Va. Code §33-2-9(a) (2006).

In the instant case of Petitioner's Administrative Complaint, the allegations were of such a large nature (e.g. number of policyholders) and referenced scope (dating back to at least 1994) that the Commissioner needed to ascertain and gather his own facts to determine if he would proceed *sua sponte* concerning such matters. A data call was made of Triton and CitiFinancial to verify loss ratio results and review filings concerning their business affairs over the referenced period of time. Thousands of pages of data were

accumulated and reviewed by the Commissioner's staff in order to verify the conduct of CitiFinancial and Triton during the referenced time frames. This authority is directly given to the Insurance Commissioner by statute and as such would not be something that could be utilized in a consumer hearing as referenced in W.Va. Code §33-20-5(d) (1967). The Commissioner has licensing and fine authority over entities who fail to cooperate with such investigations which are confidential and protected from general disclosure.<sup>10</sup>

In a short period of time, the Commissioner was able to obtain a large amount of data for his review and that of experts hired on his behalf to ascertain if any violations occurred. The cited statutory authority is a valid and effective manner to confidentially communicate and obtain sensitive company proprietary data in order to ascertain violations of the code and protect policyholders in the state without subjecting the company to loss of proprietary information or public dissemination thereof where not warranted.

In total, the Commissioner accumulated over 3700 pages of data and documents as the record reflects in this matter. (A. 574-1692). In conjunction with a W.Va. Code §33-2-9 (2006) data call and examination of the company affairs, the Commissioner also has authority under W.Va. Code §33-2-3a (2007) to conduct investigations.

**(a)** In addition to the authority granted to the fraud unit created in article forty-one [§§ 33-41-1 et seq.] of this chapter and to the workers' compensation fraud and abuse unit previously transferred to the commissioner pursuant to section one-b [§ 23-1-1b], article one, chapter twenty-three of this code, the commissioner has the authority to conduct investigations whenever he or she has cause to believe that a violation of any provision of this chapter or of chapter twenty-three [§§ 23-1-1 et seq.] of this code has been or is being committed. W.Va. Code §33-2-3a(a) (2007).

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<sup>10</sup> See W.Va. Code §§33-2-11 (2009), 33-3-11 (1973), 33-2-9(1) (4) (2006) and 33-2-19 (2007) among others.

The statutory authority grants the Commissioner the right to conduct confidential investigations to ascertain relevant documentation and evidence concerning potential violations of the West Virginia Code. *See also* W.Va. Code §33-2-19 (2007).

The Commissioner undertook such investigation in regards to the Petitioner's Administrative Complaint. Documents and discussions were exchanged between the Insurance Commissioner's staff and Petitioner's various counsel. Petitioner was asked to submit documentation concerning his allegations and did so accordingly. Petitioner was able to provide argument in writing in excess of that allowed by Respondents. (A. 1535-1692).

As previously stated, Petitioner sought Commissioner's disapproval of rates dating back to 1994 until the present. (A. 577). Hanley Clark was the duly appointed Insurance Commissioner of West Virginia in 1994 or when the referenced rate filings were made. Consequently, Mr. Clark, then acting Insurance Commissioner, approved the rate filings which are the basis of the Petitioner's Administrative Complaint. *See Affidavit of Hanley Clark.* (A. 82-89). Additionally, Mr. Clark has not been the Insurance Commissioner in over twelve years. Mr. Clark was not asked to make an official decision concerning the Petitioner's Administrative Complaint as he is no longer acting as Commissioner for the State of West Virginia. Only Michael D. Riley<sup>11</sup>, current duly appointed and acting Insurance Commissioner, has the authority in the State of West Virginia to make the determination concerning approval of rates that are filed before his Offices.

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<sup>11</sup> There is no dispute that Jane L. Cline was lawfully appointed Insurance Commissioner during the pendency of the Administrative Complaint and subsequent portions of the Administrative Appeal to the Circuit Court of Kanawha County.

Allowance of interjection of opinion in rate filing cases is precisely again why *CitiFinancial v. Madden* (citation omitted) is so relevant in this regard. This type of influence interjected upon the Commissioner does not allow him to fulfill his policymaking and legal duties as the duly appointed Insurance Commissioner of the State of West Virginia. If other opinions are allowed to interfere into the lawful conduct of his affairs, then it would be extremely difficult to conduct the business of the Offices of the Insurance Commissioner, timely handle issues by companies doing business in the State, and provide a stable marketplace for doing business in the State of West Virginia.

All of these arguments would hold true additionally for the use of Petitioner's actuary, Mr. Scruggs. (A. 507-511). Again, constant dueling of experts would prevent the day to day operational handling of the insurance regulatory duties and affairs of state government and for the policyholders of the State of West Virginia to have a vibrant and competitive market in which they can consume insurance products.

Additionally, insurance companies have a right to rely upon filing approvals by the Insurance Commissioner in operating their business in the State of West Virginia. To arbitrarily go back and change the rules on companies, clearly can destabilize the market and the Legislature has spoken concerning the same. *See* W.Va. Code §33-6-30 (2002).

Petitioner mentions in his Brief, the existence of model laws of the NAIC or National Association of Insurance Commissioners. *See Petitioner's Brief* pg. 2. While these model laws are in fact available for states to adopt as they determine necessary, many states do not always adopt such rules and many modify them to meet the particular needs of their constituents. Model laws are simply suggestions and are not binding or persuasive unless and until a particular legislature adopts the same and makes it binding

law in the jurisdiction. Consequently, Petitioner's use of NAIC Model Laws should have no binding or persuasive effect in this matter and is an attempt to get this Court to adopt such models and circumvent the legislative process retroactively.

It should be noted by the Court that Petitioner has had more than ample opportunity to present his issues in multiple forums over a number of years and that any suggested denial of due process or other legal rights concerning these matters should be rejected. Petitioner filed the instant case several years ago in the Circuit Court of Marshall County. Litigation ensued and discovery was in fact exchanged between the parties to the matter. The matter was then heard on briefs in the West Virginia Supreme Court of Appeals making referenced case law in *State of West Virginia Ex Rel. CitiFinancial, Inc. v. The Honorable John T. Madden, Judge of the Circuit Court of Marshall County and Paul Lightner*, 223 W.Va. 229, 672 S.E.2d 365 (2008).

Petitioner then filed a voluminous complaint with the West Virginia Offices of the Insurance Commissioner and provided thousands of pages of information he had obtained in his investigation of the matter. (A. 579 & 1535). Consequently, Petitioner has been able to meaningfully and exhaustively raise and put forth his arguments and evidence concerning all ramifications and avenues of recovery concerning the referenced administrative complaint in multiple forums without creating any factual dispute.

The West Virginia Supreme Court of Appeals quoting *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L. Ed. 2d 18 (1976) has stated that "the principle that due process issues must be decided on the facts of the particular case and that once it is **determined** [emphasis added] that due process applies, the question to be answered is what process is due." *Bone v. W.Va. Dept. of Corrections*, 163 W.Va. 253; 255 S.E.2d

919 (1979) at 260, 922. Further analysis by the United State Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L. Ed. 2d 18 (1976) elicited the following.

Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands. Accordingly, resolution of the issue whether the administrative procedures are constitutionally sufficient requires analysis of the governmental and private interests that are affected. More precisely, identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 334, 902-903, 33 quoting *Goldberg v. Kelly*, 397 U.S. 254, at 263-266 (1970) and *Cafeteria Workers v. McElroy*, 367 U.S. 886, at 895 (1961).

One must first look at what is being requested by the Petitioner. He is asking that rates approved now some 18 years ago be disapproved. Petitioner seeks to have the Insurance Commissioner go back and unwind the decision having been previously made by a prior Commissioner in some instances. The first issue is whether this is even a significant property right to which due process even attaches. The State has not taken any action or deprivation against Petitioner that affects his substantial rights. He paid the premium and in return was provided the requisite insurance coverage. The rates were filed and approved and there is no contention to the contrary. Any action the Commissioner would take in the requested hearing cannot have a retroactive effect.<sup>12</sup>

Additionally, where the insurance policy form, including any endorsement thereto, has been approved by the commissioner, and the corresponding rate has been approved by the commissioner, there is a presumption that the policy forms and rate

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<sup>12</sup> W.Va. Code §§33-20-5 (b), (c) & (d) (1967), "...Said disapproval shall not affect any contract made or issued prior to the expiration of the period set forth in said notice."

structure are in full compliance with the requirements of the chapter. W. Va. Code §33-6-30(c) (2002).

The issue of due process has been discussed within the Supreme Court of Appeals and the United States Supreme Court. “The point that bears emphasizing in the instant case is that neither the statutes relating to the closing or consolidation of schools nor the WVBE regulations mandate that the WVBE hold an administrative hearing before determining whether to accept, modify, or reject a local board of education’s plan to close or consolidate its schools. In the absence of such a right to a hearing, a contested case does not arise under the APA. Thus, the respondents are not entitled to utilize the APA in order to bring this suit in the Circuit Court of Logan County.” *State of West Virginia ex rel. W.Va. Board of Education v. The Honorable Roger L. Perry*, 189 W.Va. 662, 668; 434 S.E.2d 22, 28 (1993). Such mandate is not contained within the confines of West Virginia Code Chapter 33 in regards to this matter. It is clearly within the Commissioner’s discretion.

Consequently, the burden of holding an administrative hearing to delve into filings approved over 18 years ago would most likely be great as opposed to very little to no benefit for West Virginia consumers who have already obtained the benefit of coverage. Another consideration should be the delay in proceeding with this administrative complaint. Fourteen years creates evidentiary and proof problems as well as witness and documentation issues. This is precisely why these decisions are posited with the Commissioner who is in the best position via his expertise to make the decisions on such issues at the time of the approval. “Again, based upon discretion that is afforded the Tax Department in ‘choosing and applying the most accurate method of appraising

commercial and industrial properties,’ this Court does not find error with the Tax Department's methods of valuing Century Aluminum's industrial personal property. *ABPP*, 208 W. Va. at 252, 539 S.E.2d at 759, Syl. Pt. 5, in part. The Court finds that the circuit court did not err in its determination that ‘[t]he Tax Department's decision to reduce the value of the Machinery and Equipment by fifty percent to account for obsolescence was neither arbitrary nor capricious. The reduction in value is supported by substantial evidence in the record.’” *Century Aluminum of W. Va., Inc. v. Jackson County Comm'n*, 728 S.E.2d 99, 111 (2012). The Commissioner’s process and subsequent Order revealed its analysis, investigation, conclusions of law in a transparent fashion as evidenced by the voluminous Appendix and Circuit Court Record. The Commissioner did not abuse his discretion but rather went above and beyond the necessary confines and procedures to methodically ascertain whether a problem existed for all policyholders in the State. It should not be said his procedure was clearly wrong or clear error of law but painstakingly reviewed from all angles.

Petitioner attempts to have this Court invoke the Administrative Procedures Act, W.Va. Code Chapter 29A, to provide him some sort of substantive rights not conferred by Chapter 33 of the West Virginia Code. This type of argument has not been upheld by West Virginia Supreme Court of Appeals. “The provisions of W.Va. Code §29A-5-1, et seq., outlining the procedure for hearing contested cases do not create substantive rights as such rights must exist either by statutory language creating an agency hearing, by the agency’s rules and regulations, or by some constitutional command.” *State of West Virginia ex rel. W.Va. Board of Education v. The Honorable Roger L. Perry*, 189 W.Va. 662; 434 S.E.2d 22 (1993), Syllabus Pt. 2.

Additionally, Petitioner raises *Hurley v. Allied Chemical Corp.*, 164 W.Va. 268, 262 S.E.2d 757 (1980) for support for the administrative request. However, *Hurley* is distinguishable from the case *sub judice*. *Id.* *Hurley* dealt with whether an implied cause of action against a private employer who denies employment to an otherwise qualified individual on the sole basis that such individual had received services for mental illness, mental retardation or addiction. *Id.* While the factual scenario is not representative of the case *sub judice*, the Court did rely on the fact that an “enforcement vacuum existed, and therefore a private cause of action not only does not disrupt the legislative scheme, but provides the means of enforcing the salutary goal.” *Id.* As discussed herein, there is a legislative enforcement scheme in place for the Insurance Commissioner and it was implemented as shown. It has been shown that the Commissioner exercised his lawful investigative and regulatory discretion in regards to this matter. Further, this does not appear to be the relief requested so its relevance to these proceedings is not clear. *Petitioner’s Brief* at pg. 20. Therefore, for the above stated reasons, the Order of the Circuit Court affirming the Insurance Commissioner should be AFFIRMED.

**IV. The Petitioner’s Requested Relief Must Fail Because Its Complaint Has Been Unsubstantiated Throughout This Administrative Process**

The Petitioner’s requested relief in regards to this matter must fail as a matter of law. The Petitioner has only made conclusory observations regarding the process. He has not shown to this Court why an administrative hearing would bear on this matter other than be a “fishing expedition”. “Was relevancy and/or materiality shown here or was this a **fishing expedition?**” *State ex rel. Preissler v. Dougherty*, 166 W. Va. 240, 243, 273 S.E.2d 574, 576 (1980). The whole intent and crux of the Petitioner’s argument is that they should be allowed to determine an appropriate rate that should be approved or even

influence the decision. This is inconsistent with *CitiFinancial*. [Citation omitted.] Likewise, if you take the Petitioner's position to its most logical conclusion, where we have a policy that affects tens of thousands of policyholders, then are we looking at tens of thousands of administrative hearings regarding the same? This obviously could grind the operations of a state agency to a halt and forego its ability to regulate the critical functions of its responsibilities.

There has been no clear violation of law or clearly wrong analysis occur as supported by the Order of the Circuit Court of Kanawha County. The actions of the Insurance Commissioner comported with constitutional analysis and the Petitioner has actually been provided the ability to argue their position much more vociferously than even the Respondent's, CitiFinancial and Triton have been afforded. There has been a vast submission of evidence by Petitioner that frankly could have been ruled irrelevant in an administrative proceeding. Petitioner has not been prejudiced in any manner in presenting the facts and issues that he wished to bring forth from his argument.

However, when you discern the very core of the Petitioner's argument, he doesn't like the approval of the insurance rate for Respondent's, CitiFinancial and Triton. That position is the very essence of the argument before the Court today. Who decides these issues? Should the lawfully appointed Insurance Commissioner of the State of West Virginia? Should any policyholder who purchases insurance? Should former Insurance Commissioners? Should actuaries? The position taken by the Petitioner calls for the opening of the floodgates of litigation. Petitioner would cause the same to expand exponentially. The reasonableness of the rates in relation to the premium charged and

benefits obtained cannot be argued. The Petitioner was covered if a loss would have occurred during the policy period. He obtained the benefit of the insurance provided.

Further, Motions to Dismiss and Summary Judgment would not be legal under Petitioner's argument. There is no question that Petitioner was heard on his arguments. Petitioner simply does not like the result. Not only does he ask this Court to disregard the procedure of the Commissioner but disregard the Circuit Court entirely.

Finally, while remand is not requested by the Commissioner, he must respond to the allegations that he would not enforce the Order of this Court. Disqualifying the Commissioner from further proceedings, although unwarranted in this matter, would also disqualify the Circuit Court because it too did not agree with the Petitioner's position. Simply because a litigant does not prevail on their request for relief should not in and of itself permanently disqualify a tribunal from accepting jurisdiction where ordered. Therefore, for the above stated reasons, the Order of the Circuit Court affirming the administrative order of the Insurance Commissioner should be AFFIRMED.<sup>13</sup>

## CONCLUSION

**Wherefore**, the West Virginia Insurance Commissioner, Michael D. Riley respectfully requests that this Court grant deference to the Offices of the Insurance Commissioner and uphold the Circuit Court Order AFFIRMING the referenced administrative Order denying the requested relief of Petitioner based upon proper

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<sup>13</sup> Respondent, Insurance Commissioner is also wary of Rule 10 (d) of the Revised Rules of Appellate Procedure which requires the Respondent to refute assignments of error by the Petitioner. Respondent, Insurance Commissioner believes it has sufficiently responded to each assignment and argument of the Petitioner. However, some of the arguments of Petitioner are somewhat outrageous and conspiratorial in nature and as such the Insurance Commissioner to the extent he hasn't already replied thereto, expressly refutes, denies and does not concur with any of the allegations against the Insurance Commissioner as made by the Petitioner in that regard.

application and analysis of West Virginia law and other reasons cited herein or in the Court's further analysis.

**Respectfully Submitted,**

Michael D. Riley,  
West Virginia Insurance  
Commissioner  
*By Counsel*



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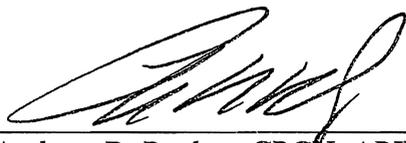
*Counsel for Respondent, West Virginia Offices of the Insurance Commissioner*

**CERTIFICATE OF SERVICE**

I, Andrew R. Pauley, counsel for the Respondent, Michael D. Riley, West Virginia Insurance Commissioner, do hereby certify that the attached **BRIEF OF RESPONDENT, WEST VIRGINIA INSURANCE COMMISSIONER** was served upon the following counsel of record by placing true copies thereof in the United States Mail, first class postage pre-paid and via e-mail, this 15th day of October, 2012:

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