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ALLSTATE INSURANCE COMPANY and
ALLSTATE INDEMNITY COMPANY

BEFORE THE INSURANCE COMMISSIONER

OF THE STATE OF CALIFORNIA

In the Matter of the Rate Application of, ALLSTATE INSURANCE COMPANY and ALLSTATE INDEMNITY COMPANY Respondents.	File No.: PA-2007-00011 **MOTION OF ALLSTATE INSURANCE COMPANY AND ALLSTATE INDEMNITY COMPANY FOR ORDER STRIKING OR DISMISSING, WITH PREJUDICE, CERTAIN PORTIONS OF THE NOTICE OF NONCOMPLIANCE AND ORDER TO SHOW CAUSE ISSUED BY THE INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA ON MAY 23, 2007**

Respondents Allstate Insurance Company and Allstate Indemnity Company (together, "Allstate," the "Company," or "Respondents") respectfully request that the Administrative Law Judge to whom this case is assigned (the "Court" or "ALJ") enter an order striking or dismissing, with prejudice, the portion of the Notice of Noncompliance and Order to Show Cause issued by the Insurance Commissioner of the State of California (the "Commissioner") on or about May 23, 2007 (the "OSC") alleging that the Commissioner has the power to, and will, upon finding that Allstate's rates are excessive, issue an order requiring Allstate to make refunds or extend credits to policyholders of any premiums billed and/or collected by Allstate on the basis of rates that were previously approved by the Commissioner and/or the California Department of Insurance (the "CDI").

Allstate is entitled to the requested relief for the reasons that: (1) the issuance of an order by the Commissioner requiring an insurer to refund premiums collected under previously approved rates is proscribed by both the applicable statutes and regulations and long-established, undeviatingly-

consistent, controlling case law, and (2) the ordered refund of premiums collected pursuant to approved rates would wreak havoc in the insurance industry and ultimately redound to the detriment of the general public.

In support of this Motion for Order Striking or Dismissing Portions of the OSC ("Motion to Strike or Dismiss"), Allstate relies upon the pleadings on file, the appropriate statutes and regulations, and the accompanying Brief in Support of Motion to Strike or Dismiss.

BRIEF IN SUPPORT OF MOTION TO STRIKE OR DISMISS

I. INTRODUCTION

In the OSC, the Commissioner claims that Allstate's current rates for homeowners' insurance ("Current Rates") are "excessive" and therefore in violation of California Insurance Code § 1861.05. By reason of this alleged "excessiveness," he proposes not merely to order Allstate to reduce its Current Rates, but to order Allstate to extend refunds or credits to policyholders on account of premiums billed or collected in the past.

The Commissioner does not specify the dates upon which the Current Rates allegedly became excessive or upon which the alleged right of policyholders to the aforesaid refunds and/or credits purportedly began to accrue. While the Commissioner purports to have determined the amount of the alleged excessiveness with great precision and accuracy (he claims that the "excessiveness" factor is 43.88%), he apparently does not know, or feels that Allstate should be required to guess, the date upon which this alleged liability began to accrue.

Significantly, the Commissioner does not and cannot contest the facts that the Current Rates: (1) were approved by the Commissioner and the CDI more than three years ago, (2) have never been the subject of an order that they be reduced or otherwise modified, and (3) have never been altered by Allstate. Moreover, the Commissioner does not and cannot claim that Allstate has charged policyholders more than the rates that his predecessor and the CDI had previously approved.

By this Motion to Strike or Dismiss, Allstate challenges the asserted right of the Commissioner and CDI to issue an order under which Allstate must extend refunds to policyholders on account of premiums that were billed and collected pursuant to duly approved rates (a "Refund Order"). We

emphasize that Allstate *does not* challenge the right of the Commissioner and/or CDI, in appropriate circumstances and by application of appropriate procedures, to order an insurer to institute a *prospective, forward-looking* reduction in homeowners' insurance rates after there has been a full evidentiary hearing on the merits of the proposed reduction.[1]

The Commissioner freely admits that, in seeking to issue a Refund Order, he is proposing to exercise alleged "rights" that neither he nor any prior Commissioner of Insurance has ever before sought to exercise; he recognizes that his actions are unprecedented. The May 23, 2007 "News Release" issued by the Commissioner at the time of issuance of the OSC contains this acknowledgement:

> Commissioner Poizner also announced his intent to seek refunds for Allstate customers if the Department of Insurance determines that their rates are excessive. **This would be the first time in California history that a retroactive refund is ordered following a rate hearing**. "I am drawing a line in the sand," said Commissioner Poizner. (Emphasis added.)

The reason this action is unprecedented is that the Commissioner has absolutely no legal authority to issue a Refund Order. In addition, the refund measures the OSC proposes to invoke are not merely unprecedented, they are unlawful. The issuance of a Refund Order by the Commissioner is proscribed by both the applicable statutes and long-established, and utterly consistent, case law. The Commissioner is wrongfully seeking to confer upon himself and his department powers that the California State Legislature and the citizens of California (through Proposition 103) did not see fit to grant them.

[1] On September 1, 2006, Respondents filed an application ("Rate Application") for an increase in their homeowners' insurance rates. The resulting "prior approval proceeding" (the "Rate Case") which has been designated File No.: PA-2006-00006, has been pending since that time. On or about September 28, 2006, the FTCR intervened in the Rate Case. In early January, the CDI issued a Notice of Hearing in the Rate Case. On April 26, 2007, Chief Administrative Law Judge Marjorie Rasmussen scheduled a full adjudicative hearing date in the Rate Case. The hearing is scheduled to commence in September of 2007. The Rate Case involves many of the same issues as the OSC. Moreover, the Rate Case will be fully litigated among the same parties. There is no practical or legal justification for the simultaneous conduct of two parallel proceedings. Moreover, there exist many legal and practical reasons why parallel proceedings of this nature should not be permitted to take place. These include, without limitation, the risk of inconsistent results, unnecessary duplication, waste of judicial, attorney, client and witness time, unnecessary expense, and the fact that the FTCR is effectively requesting that Allstate be required to fund its efforts in two, utterly-duplicative proceedings. Allstate hereby expressly reserves any and all rights it may have to object to all or any portion of the fees sought by the FTCR in this proceeding.

II. LEGAL ARGUMENT

A. Summary of Arguments.

Chapter 9 of the California Insurance Code[2] and the regulations promulgated thereunder (the "Insurance Regulations" and collectively with the Insurance Code, the "Insurance Laws") establish "a comprehensive administrative scheme" for the regulation of rates charged by insurance companies for certain types of insurance, including homeowners' insurance. *Farmers Ins. Exch. v. Superior Court*, 137 Cal. App. 4th 842, 855 (2006). Among other things, the regulatory scheme, which is embodied in dozens of pages of statutes and regulations, (1) provides for the prior approval by the CDI of all rates charged by insurers in connection with certain enumerated lines of insurance, including but not limited to homeowners' insurance, (2) absolutely mandates that insurers charge only those rates that have previously been approved by the CDI, and (3) contains a mechanism by which either policyholders or the CDI (on its own initiative) may initiate action to correct insurance company conduct that is allegedly not in compliance with this rate-setting scheme.

Significantly, while this detailed and "comprehensive administrative scheme" provides a mechanism by which the Commissioner may seek to reduce, *on a prospective basis*, the approved rates of an insurer if the Commissioner has good cause to believe such rates have become "excessive," the regulatory scheme does not allow him to issue a Refund Order. To the contrary, the issuance of a Refund Order is prohibited. Indeed, (i) the Commissioner is expressly prohibited from imposing any penalty upon an insurer for the use of an approved rate, (ii) Chapter 9 authorizes only "prospective, not retrospective, relief," and (iii) any attempt by the Commissioner or private litigant to obtain a retroactive change in approved rates is forbidden. Courts have similarly prohibited retrospective ratemaking.

The Commissioner is proscribed from ordering refunds of premiums collected pursuant to previously approved rates because it would undermine the prior approval process itself and infuse dangerous uncertainty in the insurance industry. If insurance companies may not rely upon previously approved rates, and must constantly face the risk and uncertainty that their rates will retroactively be reduced, they will be unable to create and abide by meaningful budgets, make appropriate prospective

[2] All future statutory citations are to the California Insurance Code unless otherwise noted.

business decisions involving the evaluation of profitability and investment of capital, and attract necessary capital at reasonable rates of return. Finally, because the rate approval process itself can take many months, if not years, to complete, it is unreasonable to expect insurers to raise and reduce their rates freely to reflect every wrinkle and change in the rate making environment.

Circumstances change. Filed and approved rates may become "excessive." Such excessiveness is not, however, a violation of the law giving rise to an alleged right to refunds because insurers are permitted to charge only their approved rates. It is fair because (1) the rate filing and approval process is so lengthy that rates cannot be easily brought up and down, and (2) in the likely times where the rates are inadequate, insurers are not permitted to look back and surcharge their insureds.

While the press release announcing this action included a promise that Allstate's insureds could be receiving refund checks by Christmas, this kind of legally-baseless Monday morning quarterbacking will most assuredly destabilize the insurance industry, reduce competition, and ultimately inflate the very policyholder costs that the Commissioner claims to be seeking to reduce. In the face of these promises from the CDI, we must also ask whether Allstate would similarly be permitted to review its historic rates for periods when its rates were inadequate and seek to surcharge the policyholders for those rate shortcomings.

B. The Issuance of a Refund Order by the Commissioner is Proscribed by Both the Applicable Statutes and Regulations and Long-established, and Undeviatingly-consistent, Case Law.

Section 1861.01(c) provides that no rate may be used without the prior approval of the Commissioner. Cal. Ins. Code § 1861.01(c). To obtain such approval, the insurer must file a detailed rate application and demonstrate that the requested rate both is justified and satisfies other statutory provisions and standards. Cal. Ins. Code § 1861.05(b). Moreover, insurers are legally compelled to charge only rates that have previously been approved. Ins. Code § 1861.01(c); *See, e.g., Walker v. Allstate Indem. Co.*, 77 Cal. App. 4th 750, 756 (2000) ("***the insurers must charge the approved rate and cannot be held civilly liable for so doing***") (emphasis added) (internal citation omitted).

After a rate has been approved, "[a]ny person aggrieved by any rate charged" may file a complaint with the Commissioner requesting investigation and a public hearing. Cal. Ins. Code § 1858(a). The Commissioner's powers include discontinuing approval of the rate. Cal. Ins. Code §

1858.3(a). The "sole remedy" for an aggrieved person who is dissatisfied with the Commissioner's handling of a post-approval complaint is a "timely petition for writ of administrative mandamus" to compel the Commissioner to approve or disapprove a rate or to conduct a further hearing. *Id.* § 1861.055(b); *Walker*, 77 Cal. App. 4th at 756, 757 n.5.

Both policyholders and the Commissioner have statutorily defined rights to initiate proceedings to determine if a rate is excessive, inadequate or discriminatory on a prospective basis. *See* Cal. Ins. Code §§ 1858 – 1858.7. Specifically, after a rate has been approved, "if the [C]ommissioner has good cause to believe that the . . . rate . . . does not comply with the [applicable] requirements and standards," the Commissioner must initiate the proceeding by providing the insurer with a written notice, specifically a notice of noncompliance, explaining with specificity the nature of the charge and the specific acts or omissions allegedly amounting to a violation of Section 1861.05. Cal. Ins. Code § 1858.1. If the insurer fails to correct the alleged noncompliance to the satisfaction of the Commissioner, a public hearing must be held. Cal. Ins. Code §§ 1858.1, 1858.2.

Notably, the Commissioner's authority to determine appropriate rates and issue orders pursuant to hearing, including taking any "corrective action" under Section 1858.3(a),[3] is subject to the limitations delineated in section 1858.07, which governs penalties. Section 1858.07 provides, in relevant part, that "***no penalty shall be imposed by the [C]ommissioner if a person has used any rate, rating plan, or rating system that has been approved for use by the [C]ommissioner in accordance with the provisions of this chapter***." Cal. Ins. Code § 1858.07 (emphasis added). Thus, the Commissioner is expressly precluded under Section 1858.07 from utilizing his "corrective" powers under Section 1858.3 to seek a refund of rates **lawfully charged**. Indeed, any refund ordered by the Commissioner in this proceeding would constitute a prohibited "penalty" imposed against Allstate for its use of a "rate . . . that [had] been approved for use by the [C]ommissioner," rather than a permissible "corrective action." No penalty may be exacted for charging an approved rate and the Commissioner's "corrective" powers can not include backward-looking remedies. *See Wisconsin Power & Light Co. v.*

[3] Section 1858.3(a) permits the Commissioner, after a hearing and final determination that an insurer's filed rate is excessive, in addition to prohibiting the further use of the rate, "to direct the insurer . . . to take such other corrective action as he or she may deem necessary and proper." Cal. Ins. Code § 1858.3(a).

Public Serv. Comm'n, 181 Wis. 2d 385, 408 (Wis. 1994) (affirming appellate court decision finding that Commission was prohibited from ordering a rate refund of amounts that had been validly collected as past rates because the refund constituted both a penalty and impermissible retroactive rate-making).

Section 1860.2 provides that the enforcement scheme established in Chapter 9 is the exclusive method for regulating insurance rates:

> The administration and enforcement of [Chapter 9] shall be governed solely by the provisions of this chapter. Except as provided in this chapter, no other law relating to insurance and no other provisions in this code heretofore or hereafter enacted shall apply to or be construed as supplementing or modifying the provisions of this chapter unless such other law or provision expressly so provides and specifically refers to the sections of this chapter which is intends to supplement or modify.

Cal. Ins. Code § 1860.2.

Nothing in the statutory scheme supports an action by the Commissioner to reopen ratemaking decisions in an effort to recoup premiums collected in accordance with the Commissioner's final decisions. *Walker,* 77 Cal. App. 4th at 757 n.5; *see also* Cal. Ins. Code § 1861.055(b). The Commissioner has approved no rates other than the Current Rates. The fact that the Commissioner has now made a refund request does not alter Allstate's obligations to charge only its approved rates.

Under Cal. Ins. Code § 1858.3(a), if and when the Commissioner orders a reduction in homeowners' insurance rates, the Commissioner *must* also state "when, within a reasonable period of time, the further use of that rate or rating system by that insurer . . . in contracts of insurance made thereafter shall be prohibited." Thus, Chapter 9 authorizes only "prospective, not retrospective, relief," and any attempt by the Commissioner or private litigant to obtain a retroactive change in approved rates is forbidden. *See Walker*, 77 Cal. App. 4th at 756 ("If section 1860.1 has any meaning whatsoever ... the section must bar claims based upon an insurer's charging a rate that has been approved by the commissioner pursuant to [Chapter 9]."); Cal. Ins. Code §§ 1861.10, 1861.05(a).

The insurance laws do not authorize the Commissioner to order refunds pursuant to a determination that an insurer's previously filed and approved rate is excessive. Moreover, the insurance laws do not grant the Commissioner a generalized authority to order refunds. In fact, as discussed above, the Insurance Code contains language specifically authorizing only a decrease that is prospective, and expressly barring the Commissioner from assessing a penalty against an insurer who has "used any

rate, rating plan, or rating system that has been approved for use by the [C]ommissioner." *See* Ins. Code §§ 1858.3(a) and 1858.07. The rules of statutory construction, therefore, require that the insurance laws be interpreted to prohibit the Commissioner from ordering refunds in the context of a rate hearing or non-compliance hearing. *See Associated Industries of Mass., Inc., v. Commissioner of Insurance, Mass.*, 525 N.E.2d 670, 675 (Mass. 1988) (holding that where insurance rate making is prospective in nature, retroactive adjustments to approved rates may not occur absent "specific statutory authorization"); *Anzinger v. Illinois State Medical Inter-Insurance Exchange*, 494 N.E.2d 655 (Ill. App. Ct. 1986) (holding that rate making operates prospectively only, and absent statutory authorization, the Insurance Commissioner can prohibit only the future use of a purportedly excessive rate).

The California legislature could have promulgated laws authorizing the Commissioner to order refunds after a determination that an insurer's filed and approved rate was excessive. Wisely, it did not. Instead, the legislature created a statutory scheme that authorizes only a prospective decrease, and expressly prohibits the Commissioner's attempt to order a refund of Allstate's approved rates – even if those rates are subsequently found to be "excessive." In short, the Commissioner's attempt to issue a Refund Order is directly contrary to California law and must be quashed.

C. Courts Have Consistently Rejected Attempts at Retrospective Ratemaking.

The Commissioner's attempt to seek a refund of Allstate's previously approved rates also flies in the face of long standing California precedent recognizing that prior approval prospective rate setting schemes do not permit retroactive ratemaking and refund actions. Indeed, for decades, California courts have consistently refused to allow the revisitation and redetermination of previously approved rates, as well as the ordered disgorgement of funds lawfully collected on account of such rates.

In *Pacific Telephone & Telegraph Co. v. P.U.C.*, 62 Cal. 2d 634 (1965), for instance, the California Supreme Court held that there is no right to obtain a retroactive refund of a previously approved rate where the rate order has become final. *Id.* at 650-55. In that case, the agency charged with regulation of telephone rates determined that rates should be reduced not only prospectively, but also retroactively. The agency ordered refunds of rate amounts charged in the two years before the agency's determination reducing the rates. The court held that the agency could not require the refund of

rates fixed by an order which had become final, even where those fixed rates were subsequently determined to be unreasonable and were reduced by a later order. *Id.* at 649-55.

The California Supreme Court reaffirmed the rule against retroactive refunds in *City and County of San Francisco v. P.U.C.*, 39 Cal. 3d 523 (1985). In that decision, an agency authorized a rate increase based on an estimate of the regulated company's costs. When the rate was later attacked on grounds of its alleged "excessiveness" because the cost estimate was believed to be inaccurate, the court upheld the agency's decision not to reduce the previously approved rate increase. The court unequivocally stated that the rate could not be revisited and retroactively determined:

> [T]he commission may prescribe rates only prospectively; if its determination is reasonable when made, it will stand even if subsequent events prove it to be otherwise.

Id. at 534. The court went on to state that reconsidering the already approved rate would, in effect, reopen the general rate proceeding, which was then final and no longer subject to review; it would also "threaten impermissible, retroactive ratemaking." *Id.* at 535.

In a closely analogous dispute, the California Court of Appeals recently held that an "insurer's action of collecting premiums consistent with an approved rate . . . precludes any further civil challenges to those actions to recoup premiums charged pursuant to approved rates." *Walker*, 77 Cal. App. 4th at 757-60. In *Walker*, private litigants initiated litigation against more than 70 insurance companies, seeking damages or disgorgement of allegedly excessive premiums the insurers had collected in accordance with rates previously approved by the Commissioner. *Id.* at 752. "The causes of action were each bottomed on the insurers charging approved rates alleged nevertheless to be 'excessive.'" *Id.* at 753. The court rejected this argument, and held the action was barred under the Insurance Code. *Id.* at 756. Specifically, the court explained that:

> If section 1860.1 [of the Insurance Code] has any meaning whatsoever (which under the accepted rules of statutory construction it must), **the section must bar claims based upon an insurer's charging a rate that has been approved by the commissioner** pursuant to the amended McBride Act. The statutory scheme enacted by the voters in Proposition 103 compels this result. Under this scheme, the commissioner is charged with setting rates after an extensive hearing process in which consumers and interested parties are encouraged to participate... **When this process has run its course, the insurers must charge the approved rate and cannot be held civilly liable for so doing**.

Id. at 754 (emphasis added). The court stressed that "[n]othing in the statutory scheme ... supports an action in the court to reopen ratemaking decisions years after the time for judicial review of those decisions has passed in an effort to recoup premiums collected in accordance with the commissioner's final decisions." *Id.* at 757 n.5.

As stated in *Walker*, if Section 1860.1 is to "have any meaning whatsoever," it must be interpreted to "bar claims based upon an insurer's charging a rate that has been approved by the Commissioner pursuant to Chapter 9, including proposition 103." *Walker*, 77 Cal. App. 4th at 755. This holding is made necessary by the fact that insurers must, as a matter of law, charge only those rates and implement those class plan rating systems approved for use by the Commissioner. *Id.* at 753; Cal. Ins. Code § 1861.01(c). This statutory rule is consistent with the "filed rate doctrine," an analogous federal law doctrine which provides that a regulated entity is entitled to charge rates approved by its regulator, and that a subsequent action to recover supposedly excess amounts collected under the approved rate structure will not lie. *Id.* at 757, n.4 (recognizing that "[t]he [filed rate] doctrine . . . is analogous to the scheme explicitly embodied in the Insurance Code and, to the extent it is relevant at all, is consistent with our interpretation of the statutory provisions at issue in this case"); *see also Zangara v. Travelers Indem. Co. of America*, 423 F. Supp. 2d 762, 776 (N.D. Ohio 2006) (explaining that the filed rate doctrine mandates that any insurance rate filed with the governing regulatory agency is "*per se* reasonable and unassailable in [subsequent] proceedings").

Courts in virtually every jurisdiction, including California, have applied this analogous doctrine to prohibit the refund or "restitution" of funds collected pursuant to rates approved by regulatory agencies. *See, e.g., Verizon Delaware, Inc. v. Covad Commc'ns Co.*, 377 F.3d 1081, 1088-89 (9th Cir. 2004) (stressing that even an indirect attack that would have the effect of changing a filed rate cannot be made); *Gallivan v. AT&T*, 124 Cal. App. 4th 1377, 1382 (2004) ("bar[ring] not only lawsuits challenging filed rates or seeking to enforce rates different from the filed rates, but also lawsuits challenging services, billing or other practices when the challenge, if successful, would effectively result in modification of the filed tariff through the award of damages"); *see also John Hancock Prop. & Cas. Ins. Co. v. Commonwealth, Ins. Dep't*, 554 A.2d 618, 621-22 (Pa. 1989) (precluding insurance commissioner from ordering refunds of lawfully implemented rates which were subsequently

disapproved); *Hamm v. Cent. States Health and Life Co. of Omaha, S.C.*, 386 S.E.2d 250, 254 (S.C. 1989) (barring Commissioner from ordering refunds years after rates had been approved and placed into effect without challenge); *Caldwell v. Ins. Co. of N. America, Ga.*, 218 S.E.2d 754, 758 (Ga. 1975) (holding that the Commissioner only had authority to prohibit the use of filed rates, not to order refunds of premiums previously collected pursuant to rates subsequently deemed excessive); *South Carolina Elec. and Gas Co. v. Pub. Serv. Comm'n.* 272 S.E.2d 793, 795 (S.C. 1980) (ruling that "[t]he Commission has no more authority to require a refund of monies collected under a lawful rate than it would have to determine that the rate previously fixed and approved was unreasonably low, and that the customers would thus pay the difference to the [company]").

Here, there is express statutory authority that precludes the use of rates other than those that have been filed with, and approved by, the Commissioner. *See, e.g.*, Cal. Ins. Code § 1861.01(c). These provisions, as well as the comprehensive administrative scheme for rate approval and review by the Commissioner, are completely consistent with the filed rate doctrine. Moreover, without application of the filed rate doctrine, California's comprehensive administrative scheme for rate approval and review would be rendered meaningless. *See Walker*, 77 Cal. App. 4th at 753; Cal. Ins. Code § 1861.01(c).

D. The Ordered Refund Of Premiums Collected Pursuant To Approved Rates Would Wreak Havoc In The Insurance Industry and Ultimately Redound to the Detriment of the General Public.

As a practical matter, the Commissioner's attempted Refund Order, if permitted, would wreak havoc in the insurance industry. Indeed, retroactive ratemaking would create uncertainty, hamper insurers' ability to raise capital and destroy the integrity of the ratemaking process. Simply put, insurance companies cannot possibly be expected to conduct their businesses if at any time the Commissioner can retroactively rescind rates that had been previously approved, set lower rates, and require the difference to be refunded to the policyholders.

To compel insurers to refund premiums collected pursuant to previously approved rates would undermine the prior approval process itself and infuse dangerous uncertainty in the insurance industry. If insurance companies may not rely upon previously approved rates, and must constantly face the risk and uncertainty that their rates will retroactively be reduced, they will be unable to create and abide by

meaningful budgets, make appropriate prospective business decisions involving the evaluation of profitability and investment of capital, and attract necessary capital at reasonable and affordable rates of return. *See Spintman v. Chesapeake & Potomac Tel. Co.*, 255 A.2d 304, 308 (Md. 1969) (stressing that without the rate stability provided by the rule against retroactive ratemaking, "reasonable ratemaking would prove farcical," and the business of insurance and risk spreading will be too uncertain and too unpredictable to be effective or fair). In addition, insurers could never be certain that their statutory capital and surplus is adequate to support their exposure if at any time they could be ordered to make large refund payments to their policyholders. Indeed, it would almost suggest that insurers should be as thinly capitalized as possible on the theory that no regulator would order such a refund if it would put the insurer into financial difficulty.

Moreover, if the Commissioner is permitted to alter rates after the fact and to order companies to refund premiums previously received, investors could not rely on financial statements issued by companies, and regulated entities would find it very difficult to attract capital at reasonable and affordable rates of return. *In re Elizabethtown Water Co.*, 527 A.2d 354, 361 (N.J. 1987) (explaining that rate stability is necessary to, among other things, enable the company to attract the capital necessary to provide service). As one court has explained:

> [No company] could attract capital . . . if the Commission could at one time fix rates for that [company] and then at some later time rescind those rates retroactively, fix lower rates retroactively and require the difference to be refunded to the ratepayers. The law... was not designed or intended to create chaotic conditions in the market . . .

Indiana Tel. Corp. v. Public Serv. Comm'n, 131 Ind. App. 314, 341 (1960) (stressing that retroactive ratemaking will create uncertainty, hamper companies' ability to raise capital and destroy the integrity of the ratemaking process).

Finally, we note that if the Commissioner is permitted to determine that an insurer's approved rates had actually become excessive at some point in the past and that, as a result, refunds are in order, the insurer should similarly be entitled to review their historic rates and determine that they had been inadequate and charge policyholders a surcharge for insurance provided during the subject time period.

III. CONCLUSION

For the foregoing reasons, the Administrative Law Judge should enter an order striking or dismissing, with prejudice, the portion of the Notice of Noncompliance and Order to Show Cause issued by the Insurance Commissioner of the State of California on or about May 23, 2007 alleging that the Commissioner has the power to, and will, upon a finding that Allstate's rates are excessive, issue an order requiring Allstate to make refunds or extend credits to policyholders of any premiums billed and/or collected by Allstate on the basis of rates that were previously approved by the Commissioner and/or the California Department of Insurance.

Dated: June 4, 2007

LEBOEUF, LAMB, GREENE & MACRAE LLP
Attorneys for Allstate Insurance Company and Allstate Indemnity company

By: _____
Brett J. Kitei

PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. My business address is LeBoeuf, Lamb, Greene & MacRae LLP, One Embarcadero Center, Suite 400, San Francisco, California 94111.

On the date herein below listed, I served the foregoing document(s) described as:

MOTION OF ALLSTATE INSURANCE COMPANY AND ALLSTATE INDEMNITY COMPANY FOR ORDER STRIKING OR DISMISSING, WITH PREJUDICE, CERTAIN PORTIONS OF THE NOTICE OF NONCOMPLIANCE AND ORDER TO SHOW CAUSE ISSUED BY THE INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA ON MAY 23, 2007

on the interested parties in this action as follows:

SERVICE LIST: (SEE ATTACHED)

☒ **By United States mail**. I enclosed the documents in sealed envelope(s) or package(s) addressed to the person(s) at the address(es) in the **Service List** and placed them for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collection and mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in envelope(s) or package(s) with postage fully prepaid. I am employed in the county where the mailing occurred. The envelope(s) or package(s) was placed in the mail at San Francisco, California.

☒ **By electronic mail.** I served the documents via electronic mail, addressed to the person(s) at the email address(es) listed on the **Service List**.

☒**By messenger service.** I served the documents by placing them in sealed envelope(s) or package(s) addressed to the person(s) at the address(es) listed on the **Service List** and providing them to a professional messenger service for service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 4, 2007 at San Francisco, California.

Tracy Boothe

SERVICE LIST

Persons(s) Served (Address and Email)	Phone/Fax Numbers	Method of Service
Donald P. Hilla **California Department of Insurance** Legal Division, Rate Enforcement Bureau 45 Fremont Street, 21st Floor San Francisco, CA 94105 HillaD@insurance.ca.gov	Tel: 415.538.4108 Fax: 415.904.5490	Messenger Service and Electronic Mail
Elizabeth Mohr **California Department of Insurance** Legal Division, Fraud Liaison Bureau 45 Fremont Street, 21st Floor San Francisco, CA 94105 MohrE@insurance.ca.gov	Tel: 415.538.4117 Fax: 415.904.5490	Messenger Service and Electronic Mail
Natasha Ray Senior Staff Counsel, Office of the Public Advisor **California Department of Insurance** 300 Capitol Mall, 17th Floor Sacramento, CA 95814 RayN@insurance.ca.gov	Tel: 916.492.3559 Fax: 916.324.1883	Certified, Return Receipt Mail and Electronic Mail