GENWORTH LIFE INSURANCE COMPANY, Appellant, v. TRISH WALLACE, ACTING COMMISSIONER, NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE, Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-001231-23 CIVIL ACTION ON APPEAL FROM A FINAL DECISION OF THE NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE OAL Docket No. BKI-02284-2022

BRIEF OF APPELLANT GENWORTH LIFE INSURANCE COMPANY

BRESSLER, AMERY & ROSS
A Professional Corporation
325 Columbia Turnpike, Suite 301
Florham Park, New Jersey 07932
P.O. Box 1980
Morristown, New Jersey 07962
Telephone: (973) 514-1200
Facsimile: (973) 264-4096

SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
Telephone: (212) 839-5300
Facsimile: (212) 839-5599

SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
Telephone: (312) 853-7000
Facsimile: (312) 853-7036

BLANK ROME LLP
300 Carnegie Center
Suite 220
Princeton, NJ 08540
Telephone: (609) 750-7700
Facsimile: (609) 750-7701

Attorneys for Appellant
Genworth Life Insurance Company

On the Brief:
Cynthia J. Borrelli, Esq. (028711985)
Eamon P. Joyce, Esq. (*pro hac vice*)
Shirin Mahkamova, Esq. (*pro hac vice* forthcoming)
Stephen M. Orlofsky, Esq. (012431974)

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PRELIMINARY STATEMENT

In this case, a government agency seeks the Court's approval for acting well beyond the detailed regulations it promulgated at the Legislature's command. The agency claims to not only have authority to regulate insurers pursuant to those detailed regulations, but to also have unlimited additional authority via a broad, undefined statutory term (*i.e.*, "excessive" rates) that the agency admits is not addressed in any of its regulations and which is susceptible to many different meanings.

Precedents of the Supreme Court and this Court forbid such efforts. Equally troubling, the agency's challenged action—denial of an insurer's premium rate increases—undisputedly was not based on the concept of "excessive" rates. Rather, the agency settled on that ground as the purported basis for its action only *after* the denial. On both fronts, bedrock administrative law and due process principles mandate that regulated entities have advance notice of the rules and standards to which they will be held.

At first blush, this case might seem to be about insurance rate-making or actuarial aspects of the Department's consideration of rate applications. It is not. Putting aside the actuarial jargon, a simple case emerges—one where the agency repeatedly violated cardinal principles of administrative law. The basics follow:

An administrative agency denied a company's applications to increase its

premium rates for long-term care insurance, a vital service that has become much more costly as care has become more expensive and Americans have lived longer. An agency letter set forth the specific grounds for denial. As it turned out, however, those stated grounds were unlawful because they lacked grounding in any regulation or statute. An evidentiary hearing proved—and the agency ultimately conceded—that the company satisfied every applicable regulation. Instead of confessing error, the agency, aided by an ALJ, ultimately imagined a new basis for the denial and rewrote its own letter as having ruled on account of "excessive" rates. The letter said no such thing. Indeed, the Final Decision on appeal, while tolerating the revisionism, admitted "the fact that the Department *did not use the word 'excessive.'*" Pa49 (emphasis added). This is doubly improper.

First, the agency's *post hoc* backfilling and rewriting requires reversal under core principles of administrative law. This Court could and should end its analysis there. Second, while this new "excessive" ground nominally appears in statutory text, it has never been defined through rulemaking or other agency action. The agency failed to do so despite the Legislature's specific command to promulgate comprehensive regulations to give meaning to the statutory terms, precedent consistently requiring rulemaking in such circumstances, and State agencies (including this very agency) having found regulations necessary to

define the same term in other statutes. The failure violates the statute's plain text, deprives the company of due process, and is arbitrary and capricious.

If not checked by this Court, each successive administration, motivated by shifting priorities and using indeterminate factors—including what the agency admitted are undefined "public interest" and "non-actuarial" concerns—will be empowered to deploy breathtakingly broad statutory language to arbitrarily pick winners and losers in a high-stakes game of insurer solvency. No insurer will ever know whether it will be granted a premium rate increase, or how to attempt to satisfy the governing administration. This result was specifically prohibited by the Legislature, but the agency's approach here, if blessed by this Court, will effectively nullify the Legislature's carefully-crafted framework. Under these circumstances, the agency's decision cannot stand.

Ultimately, an application to raise premium rates by an insurance company will never be popular. But it is essential to the long-term solvency of insurance companies and their long-term ability to pay valid claims. To that end, premium increases are specifically contemplated and authorized by New Jersey law and insurers are entitled to have their applications determined in accordance with the framework the Legislature established and in a manner that respects due process. Unfortunately, that did not occur here.

The agency's determination in this case must therefore be reversed.

PROCEDURAL HISTORY

On November 10, 2020, Genworth Life Insurance Company ("Genworth") submitted two applications to the New Jersey Department of Banking and Insurance (the "Department") for premium rate increases on its long-term care insurance policies written in New Jersey between 2005 and 2012 (a/k/a Choice 2 and Choice 2.1 policies). *See* Pa2.

On December 22, 2021, the Department issued a letter disapproving the requested rate increases. *See* Pa120; *see also* Pa123.

Genworth sought administrative review of the disapproval before an ALJ, and on June 6, 2023, the ALJ affirmed the Department's disapproval of Genworth's rate applications. *See* Pa86.[1] The Commissioner issued a Final Decision on November 9, 2023, affirming the ALJ's ruling. *See* Pa1.

Genworth timely appealed.

STATEMENT OF FACTS

A. Long-term care insurance generally

When a person needs assistance to perform various daily activities like bathing, dressing, and eating, long-term care insurance supplies coverage

[1] There are four volumes of transcript of the hearing before the ALJ, each numbered sequentially in chronological order: the January 27, 2023 transcript ("1T"), the January 30, 2023 transcript ("2T"), the February 9, 2023 transcript ("3T"), and the February 10, 2023 transcript ("4T").

against the cost of care in a nursing home, assisted living facility, or home setting. Genworth, a pioneer in this industry, is one of the largest providers of long-term care insurance. *See* 1T 57:1–11.

Due to the nature of long-term care insurance, policies are typically in force for decades before any claims are made. To price the policies, assumptions are used to develop projections many years into the future of the premiums a company is expected to earn compared to the claims it expects to incur over the lifetime of the policy form, which is known as the lifetime "loss ratio." *See, e.g.*, N.J.A.C. 11:4-34.17 & 11:4-18.5; 1T 60:1–21; 4T 775:16–76:14.[2] For example, if the insurer incurs $85 dollars in claims and costs and earns $100 in premiums, its loss ratio would be 85%. Premiums are set with the understanding that, as actual experience emerges, rate increases may be necessary to realign premiums with expected claims. For example, changes in policyholders' lifespans and the cost of care, among other things, would cause an insurer to have to pay more in claims than originally expected. 1T 60:1–21.

Because insurers must safeguard against premium levels becoming insufficient to pay future claims, cover costs, and address other expenses, rate increases are essential. The need for rate increases has been common across the long-term care insurance industry in recent years. Rising claim costs, lower

[2] The ratio does not include expenses, taxes, or profits. 3T 662:16–63:3.

mortality rates, and lower than predicted voluntary termination or lapse rates mean that many policies require premium increases. 4T 752:22–53:3, 771:13–23.

B. The long-term care insurance policies here

Genworth's policies at issue are "guaranteed renewable," meaning an insurer cannot cancel the policy or change its benefits if the policyholder continues to pay the premium. To offset the risks guaranteed renewable policies create for insurers, New Jersey's long-term care insurance regulations expressly allow insurers to change premiums. N.J.A.C. 11:4-34.4(a)(2) ("The term 'guaranteed renewable' may be used only when the insured has the right to continue the long-term care insurance in force by the timely payment of premiums and when the carrier has no unilateral right to make any change in any provision of the policy while the insurance is in force, and cannot decline to renew, except that *rates may be revised by the carrier on a class basis*.") (emphasis added)).

At issue on this appeal are Genworth's Choice 2 and Choice 2.1 guaranteed renewable policies issued in New Jersey between 2005 and 2012. Pa170; Pa174. The policies are the same regardless of the date of issuance, but implicate different regulations based on those dates. *See* Pa59. Those issued before January 18, 2006, are referred to as "loss ratio" policies and governed by

N.J.A.C. 11:4-34.17 & 11:4-18.5.[3] The policies issued after that date are referred to as "rate stability" policies and governed by N.J.A.C. 11:4-34.18.[4]

C. The applicable statutory and regulatory framework

The New Jersey Legislature enacted the Long Term Care Insurance Act (the "Act") effective July 6, 2004. *See* N.J.S.A. 17B:27E-1–27E-12. The Act provides, in relevant part:

> An insurer providing long-term care insurance issued on an individual basis in this State shall file, for the commissioner's approval, its rates, rating schedule and supporting documentation demonstrating that it is in compliance with the applicable loss ratio standards of this State. All filings of rates and rating schedules shall demonstrate that the benefits are reasonable in relation to the premium charged and that the rates are not excessive, inadequate or unfairly discriminatory.

N.J.S.A. 17B:27E-11.

The Act's purposes include: "to establish standards for long-term care insurance" and "to facilitate flexibility and innovation in the development of long-term care insurance coverage." N.J.S.A. 17B:27E-1. Before the Act, "New

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[3] Under the regulations governing loss ratio policies, premium rate increases "shall be deemed reasonable" if the anticipated and aggregate loss ratio "is at least 55 percent." N.J.A.C. 11:4-18.5.

[4] The regulations governing rate stability policies also rely on loss ratios, providing that premium rate increases "shall be determined" pursuant to a dual loss ratio standard where the present value of actual past and projected future incurred claims, inclusive of a margin for moderately adverse experience, shall be at least equal to 58% of the base level of premium and 85% of the premium attributable to any rate increases. N.J.A.C. 11:4-34.18(c); *see* Pa71.

Jersey ha[d] no specific statute governing long-term care insurance," and instead relied on regulations to oversee long-term care insurance. *See, e.g.*, H.R. 2532, 210th Leg., (N.J. 2003) (statement of Sens. Coniglio and Vitale). The bill was based on a Model Act adopted by the National Association of Insurance Commissioners (NAIC) and added "two new provisions to the NAIC Model Act": (1) "[e]very long-term care insurance policy shall be filed with the commissioner for prior approval" and (2) "[r]ate filings for long-term care insurance issued on an individual basis must receive prior approval" and "must not be excessive, inadequate or unfairly discriminatory." *Id.*

Central here, the Act provides that "[t]he commissioner *shall* promulgate regulations, pursuant to the 'Administrative Procedure Act,' P.L. 1968, c. 410 (C.52:14B-1 et seq.), necessary to effectuate the purposes of this act including, but not limited to, regulations dealing with . . . loss ratio, and other information that the commissioner feels necessary." N.J.S.A. 17B:27E-9 (emphasis added). In accordance with this mandate, the Commissioner promulgated detailed regulations, *see*, *e.g.*, N.J.A.C. 11:4-34.1 (discussing promulgation), including regulations that set forth requirements for loss ratios, *see* N.J.A.C. 11:4-18.5; 11:4-34.17, 11:4-34.18.

By contrast, the Department has taken the position that there are no regulations implementing the Act's statement that rate filings are to demonstrate

that "rates are not excessive," notwithstanding that the Legislature ordered the Commissioner to promulgate regulations. *See, e.g.*, Pa152. ("[T]he LTCI Act gave the Department the absolute discretion to deny rates it finds . . . excessive notwithstanding Genworth's compliance with the regulatory requirements."). There also is no agency guidance that spells out what that statutory concept means, nor to Genworth's knowledge had there been any agency adjudications prior to this one addressing that provision and the criteria for its applicability.

D. The Department's denial of Genworth's 2020 rate increase applications, and Genworth's challenges that led to this appeal

Genworth submitted applications in 2020 for rate increases, formulated in response to the same issues that have impacted the long term care insurance industry at large: lower voluntary termination or lapse rates and rising costs of care to populations who now live longer, among other things. Given the Department's prior approvals of less than the rate amounts Genworth requested,[5] Genworth had to request significantly increased rates in 2020 because, in addition to all the industry-wide issues, there was now less time to earn the necessary premiums, compounded with fewer policyholders among whom to

[5] In previous years, the Department had approved rate increases conditioned on recognition that further increases would be necessary to achieve certain expected loss ratios. *See, e.g.*, Pa124; Pa127; Pa13 (discussing the offer letters, and the Department's stated expectation to help Genworth achieve 64.6% lifetime loss ratio, which it then downgraded to 75% in 2018).

spread the rate increase. *See* 1T 87:6–19, 204:22–05:10; 2T 308:1–15. As Genworth explained in a presentation to the Department, "emerging claims experience has been significantly worse than originally expected, particularly at the attained ages of 75 and older." Pa9 (cleaned up). Unless the necessary rate increases were granted in a timely manner, Genworth would "need future, significant additional rate increases." Pa9.

Importantly, Genworth's requested premium rate increases were calculated in accordance with formulas specified in the regulations. Yet, after over a year of back and forth with Genworth during which time Genworth answered the Department's questions and provided additional information and analysis, the Department disapproved Genworth's proposed rate increase for the policies issued after January 2006, stating:

> - Your assumption regarding the acceptable maximum lifetime *loss ratio* of 64.3% represents an *aggressive loss ratio* target. GLIC's positions to both bring the lifetime *loss ratio* closer to the original pricing target and to use profits from this block to pay claims for other GLIC business do not represent an intent for GLIC to share the burden of the unfavorable performance for these policies with the policyholder . . . . The Department expects carriers to share materially in the unfavorable performance.
> - The current lifetime *loss ratios* without margins for adverse experience and before any rate increase in New Jersey, 88.8%, and nationwide, 86.4%, do not reflect enough deterioration to warrant a rate increase currently.
>
> Therefore, the Department does <u>not</u> approve your request for an increase.

Pa120 (emphasis in italics added).[6] The Department also disapproved Genworth's proposed rate increase for the policies issued earlier, finding the approvals inter-dependent. Pa123; Pa120

On administrative review, the ALJ held a multi-day evidentiary hearing that focused on Genworth's compliance with the applicable promulgated regulations. *See, e.g.*, 1T 10:2–6 (the appendix provided to the ALJ by the parties "identified the full sort of loss ratio and rate stability *regulations*" (emphasis added)); *id.* 39:5–40:25, 41:8–14, 48:17–21 (Department's opening statement: "*regulations are essential*" (emphasis added)).[7] The ALJ recognized the evidence showed Genworth complied with all the Department's regulations, including its regulations governing loss ratios. *See, e.g.*, Pa56 ("The parties largely agree that Genworth's filings comply with the applicable

[6] The letter did not cite any of the regulations governing "loss ratio" to support these rulings. *See* Pa123; *see also* Pa56. Nor do the regulations or even the statute speak to the concepts the letter described as dispositive, *e.g.*, the "aggressive[ness of] loss ratio targets," what "loss ratios" reflect "enough deterioration" to qualify for rate increases or address the obligation on insurers "to share the burden of unfavorable performance . . . with the policyholder."

[7] Testimony elicited from witnesses centered on the regulatory scheme. *See, e.g.*, 1T 74:19–79:17, 96:21–25, 108:9–10:14, 119:4–20:23, 133:22–34:24, 147:21–55:17, 159:1–66:19, 168:17–72:1, 178:3–82:8 (Sheahon); *id.* 207:11–12:14, 217:1–18:16, 228:17–20, 257:13–61:17 (Vichinsky); 2T 283:2–85:21, 287:17–92:2, 293:5–305:5, 342:20–45:9, 356:12–59:9, 379:4–82:19, 386:7–91:19, 422:11–26:11, 466:16–76:21 (Schmitz); 3T 504:18–07:13, 512:18–23, 515:2–16:9, 519:14–21:3, 523:2–27:25, 544:9–47:14, 551:1–52:7, 554:8–55:7, 597:24–98:22, 601:19–02:9, 605:2–13:17 (Eom); 4T 775:16–78:9 (Segal).

regulations . . . ."); Pa71 ("I FIND that for the rate stability policies, Genworth developed the increased rates according to the dual loss ratio formula in the rate stability regulation, N.J.A.C. 11:4-34.18(c). I further FIND that Genworth set the increased rates for the loss ratio policies to result in a lifetime loss ratio that complied with the 55% loss ratio standard under the loss ratio regulations.").

Nonetheless, the ALJ affirmed the Department's disapproval of Genworth's rate applications, imputing to the Department a never-stated finding that the rate increases had been rejected on the grounds that they were "excessive." *See, e.g.*, Pa84. The ALJ admitted that this excessiveness-based affirmance rested on "considerations outside the regulations." Pa56; *see also* Pa74 (similar). Moreover, the ALJ stated that the governing "regulations do not state what is considered ['']excessive['] or refer to 'excessiveness.'" Pa78; Pa84 ("[T]he regulations and Act do not define what constitutes excessive, giving the Department the flexibility to assess rate requests and other requirements under the Act."); *see also* 1T 37:3–6, 49:24–50:5 (the Department's counsel arguing that "the regulations are just a starting point").

The Commissioner affirmed the ALJ's ruling imputing to the Department the "excessiveness" basis for disapproval of Genworth's rate filings. *See* Pa52. This appeal followed.

ARGUMENT

I. THE COURT SHOULD REVERSE THE DEPARTMENT'S DISAPPROVAL OF GENWORTH'S APPLICATIONS AS ARBITRARY AND CAPRICIOUS, AS WELL AS CONTRARY TO LAW. (Raised below: Pa1; Pa53; Pa120)

The administrative rulings on appeal must be reversed for either of two independent reasons.

First, well-established principles of administrative law prohibit agencies from justifying their decisions with newly-minted *post hoc* rationales. That is precisely what occurred here. The Department disapproved Genworth's rate filings on the specific grounds just quoted *supra*, at 11. Upon Genworth's challenge before the ALJ, it became abundantly clear even to the Department that the bases its letter invoked lacked any conceivable grounding in the text of any regulation or statute. So an entirely new ground for disapproval was invented *post hoc*—"excessive" rates. While this new ground was nominally plucked from the statutory text, *see* N.J.S.A. 17B:27E, it was wholly unmoored from the very disapproval letter that Genworth was challenging. No matter how the Department characterizes its grounds for disapproving Genworth's rate filings now, it cannot rewrite the disapproval letter's stated reasons that *nowhere* mention statutory "excessive[ness]." Indeed, Genworth had been engaged in discussions with the Department for over a year before the denial letter issued and *never* did the Department mention "excessive" rates or cite the statute where

that term appears. *See, e.g.*, Pa95, Pa101, Pa106, Pa109, Pa112, Pa115, Pa118, Pa120. Such a sudden turn of rationale is arbitrary, capricious, and contrary to law. This Court need go no further to annul the challenged determination.

Second, even assuming it had been permissible for the ALJ and the Commissioner to use newly identified excessiveness grounds as the basis for affirming the Department's letter disapproving Genworth's applications (it was not), that newly-identified ground is itself substantively illegal and cannot be upheld on appeal. The Department was required, and failed to, promulgate regulations implementing the "excessive" clause of the Act. Without any regulations or even any other agency guidance about the meaning of the statutory term, Genworth had no notice of what criteria the Department would use to determine whether a proposed rate is "excessive," including no way of knowing what evidence it purportedly needed to marshal to show a lack of excessiveness during a multi-day evidentiary hearing. Nothing in the statute's use of the unadorned term "excessive" is sufficiently specific to set out the "rules of the game" required by the administrative law precedents of the New Jersey Supreme Court and this Court. Genworth had nothing to guide its proposed rate applications, and the belated "excessiveness" justification for their denial cannot be sustained as a result.

A. The ALJ and the Commissioner improperly rewrote during adjudication the Department's actual disapproval letter.

The ALJ and the Commissioner affirmed the disapproval of Genworth's applications on a new ground, that the rates sought were impermissibly "excessive". But the disapproval letter that was challenged in the adjudication said *nothing* about excessiveness—nor had the Department in any of the correspondence preceding the letter.

The Department's actual disapproval of Genworth's applications was based on extralegal considerations that the Department has now abandoned: the letter asserted that Genworth's application had "an *aggressive* loss ratio target," whereas Genworth's "current lifetime loss ratios . . . do not reflect enough deterioration." Pa121 (emphasis added). This simply has nothing to do with the later, post-evidentiary hearing conclusion that Genworth's proposed rates themselves were "excessive" under the Act. This is the height of arbitrary and capricious agency action. It placed restrictions on a regulated entity without providing fair notice to Genworth (or any other insurer) of the standards it purportedly needed to meet and what evidence it needed to present.

1. The Department's disapproval letter was not based on "excessiveness" and cannot be upheld on that ground *post hoc*.

Administrative law has long looked unfavorably on *post hoc* rationalizations as a justification for agency action. "The grounds upon which

an administrative order must be judged are those upon which the record discloses that the action was based." *Petition of Elizabethtown Water Co.*, 107 N.J. 440, 460 (1987). This Court recently "stress[ed]," for example, "that our obligation to afford substantial deference to an agency's adjudicatory decision does not force us to turn a blind eye to a post-hoc justification—that is, a reason devised to justify a decision that was already made as a fait accompli for other unstated reasons." *Berta v. N.J. State Parole Bd.*, 473 N.J. Super. 284, 303–04 (App. Div. 2022); *accord Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971) (rejecting "mere[] 'post hoc' rationalizations" for agency action).

Nor can a justification be *implied* from the agency's actual rationale *post hoc*. The Supreme Court has rejected "the suggestion that lack of express finding by an administrative agency may be *supplied by implication*." *N.J. Bell Tel. Co. v. Comm. Workers of Am., N.J. Traffic Div. No. 55, CIO*, 5 N.J. 354, 376 (1950) (emphasis added); *see Berta*, 473 N.J. Super. at 303–04 ("unstated reasons" cannot justify agency decision *post hoc*).

Thus, when an agency acts and provides a contemporaneous reason for that action, it cannot later rely on a different explanation, or argue that the after-the-fact explanation should be implied from its actual reasoning. Yet, that is exactly what happened here: the Department disapproved Genworth's proposed

rate changes based on one set of rationales stated in its letter,[8] and the ALJ and the Commissioner both affirmed that disapproval based on a completely different rationalization—"excessive" rates—*post hoc* after Genworth sought administrative review of the disapproval. The Court should reject the after-the-fact excessiveness ruling as contrary to administrative law.

The ALJ rejected any rationale for disapproval based on the regulations as written, including any regulations related to "loss ratio." *See*, *e.g.*, Pa56 (Genworth's filings "comply with the applicable regulations"); Pa71. But the ALJ claimed that the Department had actually (albeit silently) "determined that the requested rate increases were excessive and unreasonable." Pa84. Notably, the ALJ did so after Genworth *proved* over the course of multiple days of evidentiary hearings that its applications satisfied (as the ALJ, Commissioner, and Department's witnesses all conceded) all regulations. Pa56, Pa71.

The Final Decision committed the same error, agreeing with the ALJ that Genworth's filings "were excessive." Pa52. Moreover, indicative of the *post hoc* work that abounds here, whereas—as just noted—the ALJ originally deemed the rates "excessive *and* unreasonable," the Final Decision did not affirm any

[8] The rationales purportedly touched on "loss ratios," but the disapproval letter was in fact untethered from the comprehensive regulations related to that subject or any other, *see* N.J.A.C. 11:4-34. *See* Pa56 ("Indisputably, the Department's denials do not state that the filings are noncompliant with applicable loss ratio or rate stability regulations."); Pa71 (similar); *supra*, at 11–12 n.6.

finding that the rates were "unreasonable." *Compare* Pa27 ("The ALJ . . . determined that the requested rate increases were excessive and unreasonable."), *with* Pa52 (only agreeing with ALJ that the rates "were excessive").

Having acknowledged that the Department did *not* make a finding of "excessiveness" in the disapproval letter, neither the ALJ nor the Commissioner were free to "*suppl[y] by implication*" that basis into the letter at the Department's behest. *N.J. Bell Tel.*, 5 N.J. at 376 (emphasis added). Nor can this justification be imputed to the Department's decision-making *post hoc*. *Berta*, 473 N.J. Super. at 303–04 (rejecting *post hoc* "unstated reasons" as justification for agency action); *Matter of Issuance of a Permit by Dep't of Env't Prot. to Ciba-Geigy Corp.*, 120 N.J. 164, 176 (1990) (refusing to consider whether a certain presumption applied, in part because the agency conceded that, "during the permit-renewal process, [it] did not rely on the presumption . . .").

Prohibiting *post hoc* rationalization for agency action is not merely a technical legal requirement. It also furthers central purposes of agency adjudication, makes such adjudication efficient for the parties and the adjudicator alike, and ensures that regulated entities receive due process. It is fundamental to agency adjudication that "[a] party is entitled . . . to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that [it] may rebut it. Indeed, the Due

Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation." *Bowman Transp., Inc. v. Arkansas–Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974); *see also*, *e.g.*, *Moore v. Dep't of Corr.*, 335 N.J. Super. 103, 108 (App. Div. 2000) ("Administrative due process is generally satisfied if 'the parties had adequate notice, a chance to know opposing evidence, and the opportunity to present evidence and argument in response.'"); *Friedler v. Gen. Servs. Admin.*, 271 F. Supp. 3d 40, 57 (D.D.C. 2017) (Brown Jackson, J.) (remanding case to agency that originally provided notice of one basis for decision before "suddenly revers[ing] course" and ruling on two different grounds "without providing any advance notice"); *id.* at 58 ("[T]he reasons originally given . . . were later modified, and thus [challenger's] chance to present information in connection with the original sole basis . . . was a meaningless one.") (cleaned up).

The proceeding here turned these principles on their head. The denial letter was the culmination of more than a year of agency proceedings on Genworth's applications, including extensive correspondence between the parties, but never had the agency charged that Genworth's proposed rates were excessive rates or mentioned the statutory term "excessive." *See*, *e.g.*, Pa95,

Pa101, Pa106, Pa109, Pa112, Pa115, Pa118, Pa120.[9] Thus, before the ALJ, Genworth marshaled evidence to address the denial letter and the concerns raised by the Department during the lengthy proceedings leading up to the denial. There was no reason to believe that "excessiveness" of Genworth's overall rates was the purported matter at hand. *See also infra* § I.B (explaining that even with notice of an excessiveness basis for denial, it would have been unknown what excessive meant in this context). Thus, the parties instead spent days of evidentiary hearings focused on a subject—Genworth's compliance with the Department's regulations, including its loss ratio regulations—that the ALJ and Commissioner subsequently deemed irrelevant to the ruling being challenged. Nothing about this outcome furthers the purposes of administrative law or offers sufficient protection to regulated entities like Genworth.

2. **The Department's finding of an "aggressive loss ratio target" in the disapproval letter confirms that the Department never made an "excessiveness" determination**.

The Final Decision's conclusion that the Department based its denial on a finding of "excessiveness" is sleight of hand, at best. Pa52. The Final Decision itself makes this plain. While claiming that the Department's letter addressing Genworth's applications "denied the rate increases because they were

[9] Further spotlighting this glaring absence, the Department explicitly mentioned *another* part of the statute in one of its letters to Genworth. *See* Pa96 (citing N.J.S.A. 17B:26-11)).

excessive," it acknowledges "the fact that the Department *did not use the word 'excessive.'*" Pa49 (emphasis added). Having admitted as much and likely recognizing that a *post hoc* rationalization for the letter could not stand, the Department has strained to suggest that there was somehow an excessive-rate ruling lurking in the disapproval letter all along. *See, e.g.*, Pa137 (sidestepping the fact that the disapproval letter nowhere mentioned the statutory term "excessive" and arguing the Department has boundless discretion to deny rate increases even if an insurer meets the regulatory standards); Pa138 (tacitly admitting that the letter lacked any reference to "excessiveness" by arguing that testimony of the Department's witness, Seong-min Eom, provided it as a *post hoc* justification). The notion that the disapproval letter was based on excessive rates is fantastic.

The Commissioner's only attempt to show otherwise gives lie to its claim: "the Department's communications with Genworth [said] that the targeted lifetime *loss ratio* was 'aggressive.'" Pa49 (emphasis added); Pa2 ("current lifetime loss ratio . . . did not reflect enough deterioration to warrant a rate increase"); Pa15, Pa27 (same). But there is no suggestion in the Act that "excessive rates" are the same thing as "aggressive" or not sufficiently "deteriorat[ed]" "loss ratios." N.J.S.A. 17B:27E-11.

Nothing else supports that "aggressive" loss ratios and "excessive" rates

are the same thing. Any effort to substitute one term for the other falls apart, and, again, only confirms that the *post hoc* work to rewrite the letter. Dictionary definitions, for example, do not show that the two terms mean the same thing. *Compare Aggressive*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/aggressive (last visited February 12, 2024) ("4. growing, developing, or spreading rapidly"), *with*, *Excessive*, *id.*, https://www.merriam-webster.com/dictionary/excessive (last visited February 12, 2024) ("exceeding what is usual, proper, necessary, or normal"); *see* Pa84 (quoting this definition of excessive). And the most natural reading of the disapproval letter's reference to "aggressiveness"—both based on the letter's four corners and the history of discussions between the parties—is that the Department believed that Genworth sought to achieve things too fast, not that the overall rate itself was excessive (*i.e.*, too high).

Furthermore, the authorizing statute says nothing about timing—it refers to excessive rates, not those that purportedly have risen too quickly (let alone loss ratios that have done so). *See* N.J.S.A. 17B:27E-11 ("All filings of rates and rating schedules shall demonstrate that the benefits are reasonable in relation to the premium charged and that the rates are not excessive, inadequate or unfairly discriminatory."). The claim that "[t]he Department considered 'excessive' in

an ordinary and common-sense meaning," *see* Pa84; Pa27, is, therefore, nonsensical.

In sum, the Department has no basis for claiming that Genworth's applications were denied on excessiveness grounds, and this Court should reverse the *post hoc* justification that the ALJ concocted and the Commissioner adopted in the Final Decision.

B. The "excessiveness" ruling cannot stand even if the Department's *post-hoc* rationalization was permitted under law.

Even if the Department's actual disapproval of Genworth's applications were based on "excessive" rates, any such ruling also would violate cardinal principles of administrative law. The Department has not provided any guidance to regulated entities regarding what that unadorned statutory term means and how it is to be applied to applications for rate increases. *See* Pa56 ("considerations outside the regulations, expressed within the enabling statute, form the disapprovals' basis"); Pa74 ("I FIND that the Commissioner based her disapproval of Genworth's rate-increase applications on considerations outside the loss ratio and rate stability regulatory formulas for such increases.").

If the Final Decision is affirmed, it would upset more than a half-century of this State's administrative law precedents. It also would give the Department license to do exactly what such decisions repeatedly have held is unlawful—namely, make *ad hoc* decisions regarding the applicability of undefined, broad

statutory terms without providing any prior guidance or notice to regulated entities. Moreover, allowing the Department to regulate using a black box, despite that the Legislature sought the utmost transparency and thus decreed that the Department act through rulemaking, would be perverse. For all these reasons, the Court should reject this outcome.

1. **The Commissioner had to adopt regulations implementing the Act's "excessive[ness]" provision to enforce it in the manner here.**

The rule of decision reflected in the orders of the ALJ and the Commissioner rested on applying a statutory term "excessive" to the particular rate applications that Genworth submitted. This attempt by the Department to assert unbridled discretion as an appropriate basis for denial of Genworth's proposed rates does not satisfy the requirements of this State's administrative laws. Unlike in some contexts (obscenity, for instance), "I know it when I see it" does not pass muster here. Rather, the Supreme Court and this Court recognize that rulemaking is required to apprise regulated entities, like Genworth here, as to the standards with which their conduct must conform, as well as to meaningfully cabin the discretion of a regulator. Likewise, the Legislature explicitly required the Department to act by rulemaking in implementing the Act. Absent such rulemaking (or any other guidance here) Genworth had no meaningful ability to prove that its rates were not excessive.

a. **Not only do the Supreme Court and this Court require rulemaking to effectuate administrative law, but the Legislature found it imperative to effectuate *this Act*.**

In an unbroken string of administrative law decisions spanning decades, the Supreme Court and this Court have made clear that rulemaking is imperative to give meaning to broad statutory terms that will be used to govern a regulated entity's conduct. *See*, *e.g.*, *Dep't of Labor v. Titan Constr.*, 102 N.J. 1, 13 (1985); *Crema v. NJDEP*, 94 N.J. 286, 299 (1983) ("This Court has recognized the *need* . . . of rulemaking for establishing administrative law[.]") (emphasis added); *id.* at 299–301; *Boller Beverages, Inc. v. Davis*, 38 N.J. 138, 151–55 (1962). For instance, the Supreme Court has emphasized the need to have "administrative officers articulate the standards and principles that govern their discretionary decisions in as much detail as possible," adding that "an agency determination that changes existing law and has widespread application must be addressed by rulemaking and not adjudication." *Crema*, 94 N.J. at 301 (cleaned up). Similarly, an agency with "boundless [discretion] under the statute" must adopt "regulations containing standards to guide" its determinations and "assure the faithful execution of the legislative mandate." *Matter of Farmers' Mut. Fire Assur. Ass'n of N.J.*, 256 N.J. Super. 607, 621 (App. Div. 1992) (quoting *Holmdel Builders Ass'n v. Township of Holmdel*, 121 N.J. 550, 578 (1990)).

Indeed, the Supreme Court has long made clear that agency action is

invalid absent prospective and "sufficiently definite regulations and standards," because an "essential quality" of the administrative state is "fairly predictable decisions." *Boller Beverages*, 38 N.J. at 152. In language that, as shown below, fits like a glove given what the ALJ and the Commissioner did here, the Supreme Court has explained that "[p]ersons subject to regulation are entitled to something more than a general declaration of statutory purpose to guide their conduct before they are restricted . . . by an agency for what it then decides was wrong from its hindsight conception of what the public interest requires in the particular situation." *Id.* In other words, agency rulemaking is "necessary both to inform the public and guide the agency in discharging its authorized function." *Matter of Farmers'*, 256 N.J. Super. at 621 (internal quotation marks omitted). And this Court has correctly recognized that agency rulemaking "is of vital importance to . . . insurance companies and the consumer public." *Id.*; *see also id.* (recognizing the importance of rulemaking where, as here, "the breadth of the legislative mandate, the complexity and sensitivity of the subject matter, and the interests of fairness and uniformity" are at play).

Not only are the administrative law precedents well-settled regarding the necessity of rulemaking generally, but also the Legislature specifically recognized in this Act that it would be necessary for the Commissioner to promulgate regulations. "The commissioner *shall* promulgate regulations . . .

necessary to effectuate the purposes of this act." N.J.S.A. 17B:27E-9. The Legislature's "choice of the word 'shall,' . . . is ordinarily intended to be mandatory, not permissive." *Jersey Cent. Power & Light Co. v. Melcar Util. Co.*, 212 N.J. 576, 587–88 (2013); *see In re Council on Affordable Housing to Adopt Tr. Fund Commitment Reguls.*, 440 N.J. Super. 220, 226 (App. Div. 2015) ("The statute did not say that [the agency] 'may' adopt regulations or that prior regulations were sufficient; the Legislature declared in [the statute] that [the agency] 'shall' promulgate regulations.").

The Supreme Court has construed similarly worded statutory language to require rulemaking. *See In re Petitions for Rulemaking, N.J.A.C. 10:82–1.2 & 10:85–4.1*, 117 N.J. 311, 315–24 (1989). There, a statute provided that the Commissioner of Human Services "*shall* . . . [p]romulgate, alter and amend from time to time such rules, regulations and directory orders as may be necessary for the administration of State aid and for the carrying out of any provisions of [welfare] law regulating the same." *In re State Bd. Educ.'s Denial Petition to Adopt Reguls. Implementing N.J. High Sch. Voter Reg. L.*, 422 N.J. Super. 521, 533 n.5 (App. Div. 2011). Interpreting this language, the Supreme Court held that the Commissioner was obligated to specify in a regulation a "standard of need" for welfare recipients. *In re Petitions for Rulemaking,* 117 N.J. at 315–24.

These principles all should have applied to the statutory term "excessive"

upon which the ALJ and the Commissioner decided this case. But, unlike with many other aspects of the Act—take the detailed loss ratio regulations, for example, with which Genworth complied in full—the Commissioner failed to issue any guidance for the Act's "not excessive" mandate, N.J.S.A. 17B:27E-11.

b. Reversal is required because the absence of regulations meant that Genworth lacked notice of how the Department would interpret and treat the term "excessive."

The foregoing legal rules and statutory command doom the agency's belated efforts to deny Genworth's applications on the basis that the proposed rates were "excessive." Pa1; Pa54. Despite ruling on excessiveness grounds, the ALJ acknowledged that, "[s]ignificantly, the regulations and [the] Act do not define what constitutes excessive." Pa84. Nor is the statutory term "excessive" self-defining such that a regulated entity would have any idea how not to run afoul of it or what standard it set to govern proposed rates, as the Department tacitly recognizes. *See id.* (invoking selected dictionary definitions); *see also infra* § I.B.2 (discussing the Department's *ad hoc* attempt to impute meaning to the term).

For example, nowhere does the Act set forth a range of rates deemed presumptively non-excessive, as contrasted with the "loss ratios" that the regulations address in quantitative terms. *See* N.J.A.C. 11:4-18.5 ("Loss ratio

standards" setting forth specific ratios—*e.g.*, "at least 65 percent," "at least 50 percent"—deemed to be "presumed reasonable"); *see also* N.J.A.C. 11:4-34.17 (specifically defining assumptions to be used and methods of calculation to be employed in determining loss ratios). Nor does the Act provide any other guideposts for assessing what it means for a rate to be excessive. For example, is the benchmark for "excessive" the rates of other insurers in the State, the rates the same insurer charges in other jurisdictions, or something else entirely? Genworth still does not know the answer now. Nor would any reasonable observer or other regulated entity who reads the Final Decision or the Initial Decision. And Genworth certainly had no way of knowing *before* the ALJ proceedings that gave rise to the excessiveness holding.

This is no accident. The Department's decision to newly seize on the statutory term "excessive" on the fly after Genworth brought an adjudication challenging the written ruling starkly and irreconcilably contrasts with how this State's administrative bodies—including the Department itself—have fulfilled statutory delegations to address related terms. For instance, the Department's own automobile insurance regulations have defined the meaning of "excessive" with precise formulas. *See* N.J.A.C. 11:3-20.6 ("*Excessive subsidization may exist if* the number of dollars of excess profit, as calculated pursuant to this subchapter, for an individual insurer within an insurance holding company

system, exceeds .5 percent (one half of one percent) of its earned premiums for the three calendar-accident years immediately preceding the year in which the excess profits report is due to the extent that this excess profit has not been refunded or credited to policyholders." (emphasis added)); N.J.A.C. 11:3-20.3 (similar). These regulations implement N.J.S.A. 17:29A-5.7, which requires insurers to file annual profits reports and provides that "that the commissioner may order an adjustment in the combined profits report . . . one or more of the insurers in that system are *excessively subsidizing* other insurers in that system." (emphasis added)); *see also* N.J.S.A. 17:29A-5.16 ("The commissioner *shall* promulgate rules and regulations . . . that he deems necessary.").[10]

Similarly, regulations governing small employer benefit program insurance provide that "[r]ates will be considered *excessive* if they are projected to give rise to a loss ratio that is less than the loss ratio for the reference rate filing, increased by an amount that reflects the savings giving rise to the

[10] This State uses "the same canons of construction [that apply to] a statute" in interpreting "a rule of an administrative agency." *Matter of N.J.A.C. 14A:20–1.1*, 216 N.J. Super. 297, 306 (App. Div. 1987); *see State, Twp. of Pennsauken v. Schad*, 160 N.J. 156, 170 (1999). Thus, that various state agencies—including the Department itself—have promulgated excessiveness rules in other contexts, but not in this instance, is telling. This "clearly demonstrat[es] that [the government] knows how to impose such a requirement when it wishes to do so," but where it "has chosen *not* to do so, [the courts] will not override that choice based on vague and ambiguous signals." *Whitfield v. United States*, 543 U.S. 209, 216–17 (2005).

discount." N.J.A.C. 11:21-9.5 (emphasis added). The regulations implement a statute providing that "[i]f the commissioner determines that the premium reduction . . . results in rates that are *excessive*, inadequate or unfairly discriminatory, the commissioner may disapprove or deny the premium reduction." N.J.S.A. 17B:27A-25.8(b) (emphasis added)); *see also* N.J.S.A. 17B:27A-25.9 ("The commissioner *shall* promulgate rules and regulations . . . necessary to effectuate the provisions of this act." (emphasis added)).[11]

The rejection of Genworth's applications on purportedly statutory excessiveness grounds must be reversed as a result. This ruling has all the same problems as other agency action that the Supreme Court and this Court have overturned in the aforementioned (*see supra* § I.B.1.a) and additional cases holding that rulemaking was required. To begin, at least since *Boller Beverages* it has been clear in this State's body of administrative law that an agency's "mandate, either statutory or administrative *must precede* the specific

[11] Further examples include regulations governing fees charged by various medical professionals, which provide that a "fee is excessive when, after a review of the facts, a licensee of ordinary prudence would be left with a definite and firm conviction that the fee is so high as to be manifestly unconscionable or overreaching under the circumstances," and include a non-exclusive list of factors to be considered. *See, e.g.*, N.J.A.C. 13:35-6.11; N.J.S.A. 25:1-15.1 ("Consistent with their enabling acts, . . . the boards . . . are authorized to adopt rules and regulations to serve the public health, safety and welfare."). *See also*, *e.g.*, N.J.A.C. 13:32-4.5 (defining when a price charged by a licensed plumber is excessive and providing factors for evaluation of the excessiveness).

violation." 38 N.J. at 155 (emphasis added); *see Matter of Farmers'*, 256 N.J. Super. at 621 (discussing the "interests of fairness and uniformity"). Consistent with this, the Supreme Court has consistently struck down as invalid agency actions purportedly undertaken pursuant to broad and undefined statutory language when there is a lack of promulgated regulations to apprise regulated entities of "all the rules of the game" in advance of their participation. *Boller Beverages*, 38 N.J. at 152.

For example, in *Boller Beverages*, the Supreme Court set aside a decision by the Director of the Division of Alcoholic Beverage Control that required the petitioner to remove certain products from the New Jersey market, because the Director's reasons for doing so were not set out in advance. 38 N.J. at 140–41. As alluded *supra*, at 26–27, the Supreme Court could have been describing the very case now before this Court:

> The object is not legislation *Ad hoc or after the fact*, but rather the promulgation, through the basic statute and the implementing regulations taken as a unitary whole, of a code governing action and conduct in the particular field of regulation *so those concerned may know in advance all the rules of the game*, so to speak, and may act with reasonable assurance. Without sufficiently definite regulations and standards administrative control lacks the essential quality of fairly predictable decisions. *Persons subject to regulation are entitled to something more than a general declaration of statutory purpose* to guide their conduct before they are restricted or penalized by an agency for what it then decides was wrong from its hindsight conception of what the public interest requires in the particular situation.

Id. at 151–52 (emphasis added); *see id.* at 154–55 (reversing the Director's action, despite the Legislature vested him with broad discretion to make "special rulings and findings," because "the alleged transgression [the Director identified] had not been covered or proscribed by statute or regulation" before it occurred).

Indeed, notwithstanding its lip service to straightforwardly applying the statutory term "excessive" here, the Department ran headlong into *Boller Beverage*'s prohibition against agencies using "a hindsight conception of what the *public interest* requires in a particular situation." In reasoning that Genworth had to do more than satisfy the applicable regulations, the Department explicitly sought to justify its newly sprung adjudicatory definition of "excessive" by saying the agency was "expressly empowered to '*promote the public interest*' and to protect the insureds." Pa32 (emphasis added) (quoting Pa86); Pa46 ("[T]he public interest must be considered when determining whether to approve a rate increase."). It should be needless to say, but no administrative law precedent permits an agency to survive arbitrary and capriciousness review by taking an amorphous and after-the-fact view of what renders one particular rate within the public interest and another not.

Many other cases in addition to *Boller Beverages* support the same result. In *Crema*, for example, the Supreme Court struck down the New Jersey State

Department of Environmental Protection's grant of a "conceptual approval" permit despite that the power to grant such approvals could be inferred from the language of the statute. 94 N.J. at 301. The problem again, as here, was the lack of established standards. The Court held that the agency was still required to promulgate regulations before exercising that power because "due process requires some standards, both substantive and procedural, to control agency discretion." *Id.* at 301 ("the 'function of filling in the interstices of the [statutory legislation] should be performed . . . through th[e] quasi-legislative promulgation of rules to be applied in the future. . . .'"). The absence of regulations establishing the criteria upon which the agency would base its decision was thus "fatal to the agency actions" and the agency's decision was "invalid." *Id.* at 303.

And in *Titan Construction*, the Supreme Court made clear that the necessity for establishing standards, limits, and procedures to govern the agency's decision-making prospectively—as opposed to *ad hoc* and after-the-fact decision-making—is so ingrained in administrative law that it will strike down agency actions premised on statutory language despite the general principle that courts should defer to agency discretion. *See* 102 N.J. at 18. There, the Supreme Court reversed agency action for failing to heed the "critical role" rulemaking plays in the administrative process. *Id.* at 13–14. The Court

concluded "that the Legislature's authorization to the Commissioner . . . to adopt the rules and regulations necessary for the administration and enforcement of the Act imposed on the Department the *duty to act initially by rulemaking*." *Id.* at 17 (emphasis added). As here, without rulemaking, the agency's action lacked the "substantive standards and procedural safeguards that are essential to the Commissioner's exercise of his statutory . . . power." *Id.*

Similarly, in *Metromedia, Inc. v. Director, Division of Taxation*, the Supreme Court invalidated the application of a tax allocation method that was reasonable under the statute but had not been previously adopted by regulation. 97 N.J. 313 (1984). The Court explained that although the agency "has statutory discretion" to determine the proper tax allocation method, it does not mean that "the *manner* in which this discretion is exercised is not governed by the standards that determine whether rule-making or adjudication must be followed in a given case." *Id.* at 333. Also instructive is *Airwork Service Division v. Director, Division of Taxation*, decided on the same day as *Metromedia*. 97 N.J. 290 (1984). In *Airwork*, the agency imposed a sales tax on the petitioner for the repair of airplane engines where this service was particularly covered by the enabling statute. *Id.* at 292. The Supreme Court affirmed the agency action because "the taxability of these services is sufficiently clearly and directly inferable from the tax statute itself, especially in the absence of a specific

exemption." *Id.* at 301. The agency's action was valid given the statute was "sufficiently specific," *Metromedia*, 97 N.J. at 329—it addressed *exactly* the circumstance of imposing taxes on airplane engine sales. *Id.* at 333 (discussing *Airwork*).[12]

Here, the Department's disapproval of Genworth's rate filings based on a purported "excessiveness" finding was invalid because "no *substantive criteria* [were] established before the administrative proceedings for determining how to qualify for a [not excessive rate increase]." *Crema*, 94 N.J. at 302 (emphasis added). This meant Genworth, "the public and any affected or interested parties were without any firm knowledge of the *factors* that the agency would deem relevant and that might influence its ultimate decision." *Id.* (emphasis added).

[12] Similar to all these Supreme Court cases, this Court has reversed "a sharp departure by the agency in a specific case from an established administrative practice or policy by reason of which an applicant was denied relief." *App. of Union Cmty. Bank*, 144 N.J. Super. 39, 46–47 (App. Div. 1976). "[F]airness to the applicant, as well as appropriate court review of the validity of such a significant Ad hoc change, requires that the agency plainly articulate the rationale therefor and afford the applicant, as well as the objectors, a hearing at which to meet, explain or refute whatever information is submitted." *Id.* at 47. Here, however, the opposite occurred. Genworth underwent a multi-day hearing centered on denials premised on completely extra-regulatory and extra-statutory considerations that the Department has now abandoned; the excessiveness concept was sprung on Genworth after the fact, and with no indication whatsoever as to how Genworth could ever satisfy such a standard, other than the Department's view that the term should be a given a vague "common-sense" meaning—impermissibly leaving it up to the whim of the Commissioner to decide what makes "sense" and what does not.

Beyond wrongly holding that rulemaking was not necessary, the ALJ and the Final Decision committed a fundamental legal error. They posited that because "the regulations and Act do not define what constitutes excessive," that somehow "g[ave] the Department the flexibility to assess rate requests" in whatever manner it chose on the fly, as it did here. Pa84; Pa20, Pa26–27, Pa31–32 (similar). That is not only wrong, it is backwards.

Facially flexible statutory text establishing a regulatory regime *demands* the promulgation of regulations. *See supra*, at 26–29, 32–37 (collecting authority); *Cammarata v. Essex Cnty. Park Comm'n*, 26 N.J. 404, 410 (1958) (regulation promulgation provides "flexible control in areas where the diversity of circumstances and situations [an agency may encounter] forbids the enactment of legislation anticipating every possible problem which may arise and providing for its solution"). If the Act gave the Department the sort of "boundless discretion" posited here, this Court's precedent—like those of the Supreme Court—*requires* the Commissioner to adopt regulations implementing the Act's "excessive" clause. *Matter of Farmers'*, 256 N.J. Super. at 620–21.

For all these reasons, the decision below must be reversed.

2. **The ALJ's and the Commissioner's efforts to salvage an "excessive" rates determination fail.**

Nothing the ALJ or the Commissioner said in an effort to excuse their *ad hoc* application of the statutory term "excessive" demonstrates that rulemaking

was not required, or that the agency action can be upheld.

Preliminarily, the Department's contention that Genworth cannot challenge the denial because Genworth's applications certified that its proposed rates were not excessive is absurd. *See, e.g.*, Pa137, Pa139, Pa140-141, Pa141; *see also* Pa72 ("Genworth's actuarial memoranda certified that Genworth's requested rate increases were not 'excessive or unfairly discriminatory.'"). That a Genworth actuary stated in a single line at the very end of lengthy submissions "[i]n *my opinion*, the rates are not excessive or unfairly discriminatory," Pa173; Pa177 (emphasis added), sheds no light on whether the Department had defined "excessive" or done so in a manner that provided regulated entities like Genworth with any notice how *the agency* understood the concept and would apply it. Beyond Genworth's actuary's passing statement of "opinion," its submissions said nothing more about excessiveness and did not attempt to define the concept, let alone suggest that the Department had done so. Thus, this argument only highlights the arbitrary and capricious nature of the Department's disapproval, and the Department's use of *ad hoc* standards. Obviously if Genworth's own "opinion" of "excessive" governed, Genworth would be entitled to relief. Yet, and relatedly, it is the Department's obligation—not Genworth's—to provide a workable definition of excessive. If the Department disagreed with Genworth's certifications, the time to say so was well

before the disapproval letter, but the Department did not raise this argument at that time.

The Department's other defenses also fail. *First*, while acknowledging that the Legislature expressly required the Department to promulgate regulations to implement the Act, the Commissioner concluded that this mandate was irrelevant because it purportedly was not specific enough. That is, the Commissioner held that because the Legislature "did not mandate that the Commissioner promulgate regulations *directed to* the terms 'excessive' or the term 'unfairly discriminatory,'" the Commissioner was under no obligation to do so. Pa38-39 (emphasis added). But the Commissioner's conclusion does not follow from the specificity (or purported lack thereof) of the delegation. As shown above, in many of the cases reversing agency action, there was no express delegation for the agency to promulgate regulations on a subject at all, let alone a specific aspect of that subject. Rather, the relevant considerations are whether a regulation is necessary to apprise a regulated entity of all the rules of the game pertinent to what conduct is permitted, to allow agencies to make "fairly predictable decisions," and to ensure that agencies do not act by hindsight. All those considerations required regulations here.

Second, the ALJ and Commissioner suggested that this case was distinguishable from *Crema*, *Metromedia*, *Titan Construction*, and other cases

requiring rulemaking because "the Department applied a standard from the . . . Act" itself. Pa51; *see* Pa83 (similar). This observation regarding the Act does not answer any relevant question. While the term "excessive" certainly appeared in the statute, it, among other things, (i) was undefined, (ii) the Department and other agencies have concluded that it is necessary to promulgate regulations to define the same term when used in other statutes, and (iii) even by the ALJ's own admission, "excessive" carried with it no "standard" in advance of the adjudication but instead was filled-in after the fact, *see* Pa84 ("[s]ignificantly, the regulations and the Act do not define what constitutes excessive.").

Thus, the very bases upon which the ALJ attempted to distinguish *Metromedia* actually show why the agency's action should be reversed here. Indeed, although the statute at issue in *Metromedia* permitted the agency's interpretation that the corporate taxpayer's "receipts" attributable to its operation in New Jersey could be calculated using the "audience share" approach, the agency was not allowed to enforce this interpretation on taxpayers without formal rulemaking. 97 N.J. at 327. That was because the agency's action "was not otherwise expressly provided for by the statute, nor was it clearly and obviously implied." *Id.* at 334. Similarly here, even if the Department's specific (and belated) interpretation of "excessive" was not objectively unreasonable, the Department was required to promulgate regulations to implement that

interpretation because nothing about the Department's application of the term was "inferable from the enabling statute itself" and instead "reflect[ed] a new . . . position." Pa83; *see* Pa81 ("Even though using the 'audience share' method was reasonable, the Division of Taxation did not adopt the 'audience share' standard in its regulation, requiring the assessment's invalidation.").

Third, no better is the Department's contention that its decision is insulated from challenge because the Commissioner and ALJ purportedly used excessive's "common sense meaning and how that term is defined by an actuary in the industry." Pa51; Pa84 ("The Department considered 'excessive' in an ordinary and common-sense meaning."). Instead, this claim confirms that the term is an impermissible black box. To begin, common sense meaning and actuarial terms of art are not the same thing generally. And this is borne out here specifically, as is apparent from the Commissioner's acknowledgment that "[t]he ALJ cited *both* the Merriam-Webster Dictionary definition of 'excessive' *and* [the Actuarial Standard of Practice ("ASOP")] 8 as the 'guiding star' for the 'excessiveness' analysis." Pa40 (emphasis added). That particular dictionary and ASOP do not even have the same definition of "excessive." *Compare Excessive*, Merriam-Webster.com ("exceeding what is *usual, proper, necessary, or normal*" (emphasis added)), *with* ASOP 8 § 3.12.2 ("Rates may be considered excessive if they exceed *the rate needed to provide for payment of claims,*

administrative expenses, taxes, regulatory fees, and reasonable contingency and profit margins" (emphasis added)). Like the fact that New Jersey repeatedly has promulgated regulations specifically to define "excessive" in other statutory schemes, this unravels any notion that there is a single meaning to the term.

The unraveling does not stop there. For instance, straying far from any dictionary definition or ASOP guidance, the Department has admitted that its *ad hoc* interpretation of "excessive" in this case included the amorphous "public interest" consideration discussed *supra*, at 34–35. *See* Pa32, Pa43, Pa46, Pa47. More specifically, the Department's conception of excessiveness was rooted in considerations of equity—shared burden with consumers when the Department's and the regulated entity's mutual projections turn out to be wrong based on experience. *See, e.g.*, Pa15; Pa.32 ("'promote the public interest' and to protect the insureds"). But that equitable gloss on "excessiveness" is absent from the statutory language surrounding "excessive," the dictionary, *and* the ASOP discussion of the concept. And, finally, as shown *supra* § I.A.2, the Department grasped at one more definition. It contended that what the denial letter stated—namely that Genworth had an "an aggressive loss ratio target" and had "lifetime loss ratio[s] [without] enough deterioration"—were what it means to have an "excessive rate." Nothing on the face of the statute supports that shifting definition, and Genworth should not be held to a standard of being a

mind-reader or code decipherer in order to obtain an approval of its rate increase filings.

The Department has only made clear that there was no way of knowing before the adjudication whether or not a rate was "excessive" in the absence of regulations or other guidance. And things are no better post-adjudication. There is still no way of knowing what Genworth or another regulated entity would have to propose to avoid an excessive rate finding in the future, particularly given the nebulous public interest considerations that the Department relied on here and those it may apply on a whim going forward if this Court affirms. The Department's attempts to justify the result here instead confirm at every turn why rulemaking was needed before a rate increase application could be denied as excessive. *See Matter of Farmers'*, 256 N.J. Super. at 621. Put simply, any action taken under the guise of "excessiveness" is invalid as a matter of law..

* * *

At bottom, regardless of which the many definitions of "excessive" the Department ultimately might settle upon (or newly advance), the fact remains that without regulations, without any other regulatory guidance on excessiveness, without a single adjudication applying the statutory term "excessive," and with a lengthy history of communications between Genworth and the Department prior to the disapproval letter that never mentioned

excessiveness, Genworth had no way to know what this statutory requirement entailed. It was also inevitable that the ALJ and Commissioner, having improperly reframed the Department's stated denial bases as code for "excessiveness", would thereupon rule in an *ad hoc*, standardless manner. This is precisely why rulemaking was essential if the Department wished to rule on excessiveness grounds, and why reversal is required here. *See, e.g.*, *Matter of Farmers'*, 256 N.J. Super. at 621 ("the interests of fairness and uniformity" mandate adoption of rules and regulations).

Genworth was "entitled to something more than a general declaration of statutory purpose to guide [its] conduct before [it was] restricted . . . by [the Department] for what it then decides was wrong from its hindsight conception of what the public interest requires in the particular situation." *Boller Beverages*, 38 N.J. at 152; *see FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012) ("a fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."); *id.* ("unfair surprise" is improper).

The Department's "excessive" holding boils down to *ipse dixit*. The rates were excessive only because the Department ultimately said so (regardless that the disapproval letters did not). This is not a valid basis for lawful administrative action. *See*, *e.g.*, *App. of Union Cmty. Bank*, 144 N.J. Super. at 46 ("[T]he

'reasons' for the denial were legally deficient. They did not comply with the requirement that findings and reasons given by an administrative agency for its ultimate determination must be clear and specific. Unless that standard is met, the interested parties will not know the precise factual basis upon which the result has been reached by the agency, and the reviewing court will not be in a position readily to determine whether the decision is sufficiently and soundly grounded or derives from arbitrary, capricious or extralegal considerations.").

CONCLUSION

For the foregoing reasons, Genworth respectfully requests that the Court reverse the Department's disapproval of Genworth's 2020 rate filings.

Dated: Florham Park, New Jersey
March 8, 2024

Respectfully submitted,

By: _____

Cynthia J. Borrelli
cborrelli@bressler.com
BRESSLER AMERY & ROSS, P.C.

Eamon P. Joyce (*pro hac vice*)
ejoyce@sidley.com
SIDLEY AUSTIN LLP

Shirin Mahkamova (*pro hac vice* forthcoming)
shirin.mahkamova@sidley.com
SIDLEY AUSTIN LLP

Stephen M. Orlofsky
stephen.orlofsky@blankrome.com
BLANK ROME LLP

GENWORTH LIFE INSURANCE COMPANY, Appellant, v. TRISH WALLACE, ACTING COMMISSIONER NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE, Respondent.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-1231-23 Civil Action On Appeal From A Final Agency Decision of the New Jersey Department of Banking and Insurance, Order No. E23-39

BRIEF OF RESPONDENT TRISH WALLACE, ACTING COMMISSIONER NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE IN OPPOSITION TO APPELLANT'S APPEAL

Date Submitted: September 27, 2024

CARELLA, BYRNE, CECCHI, OLSTEIN, BRODY & AGNELLO, P.C.
Attorneys for Respondent, Acting Commissioner of the New Jersey Department of Banking and Insurance
5 Becker Farm Road
Roseland, New Jersey 07068-1739
gtroublefield@carellabyrne.com

G. GLENNON TROUBLEFIELD, ESQ.
Attorney ID 042321991
BRIAN H. FENLON, ESQ.
Attorney ID 035071987
ROBERT VASQUEZ, ESQ.
Attorney ID 380542022
Of Counsel and on the Brief

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PRELIMINARY STATEMENT

In this insurance rate-making case, Appellant, Genworth Life Insurance Company, appeals (for a third time) the disapproval of its unprecedented triple-digit/single year premium rate increase on its New Jersey long-term care insurance policies. Guided by the standards established by the New Jersey Legislature when it adopted the New Jersey Long-Term Care Insurance Act (the "LTCI Act"), both the Administrative Law Judge ("ALJ") and the Commissioner correctly found that Genworth failed to carry its burden to demonstrate to the Department that its rates complied with the LTCI Act. Under the LTCI Act, the Department balanced Genworth's financial goals with the need to protect innocent policyholders from excess rate increases. Genworth's policyholders are generally of older age and are on fixed incomes. Its policyholders should not have to absorb the brunt of Genworth's financial miscalculations.

Genworth argues that the Department disapproved of its premium rate increase requests using *post hoc* justifications not found in the December 2021 disapproval letters. Genworth's focus on those letters is sorely misguided. The Department's grounds for disapproval are not limited to one letter. Under applicable rules, the Department's disapproval grounds are contained in successive letter objections setting forth the bases for disapproval, to which

Genworth had an opportunity to respond. The Department's disapproval followed detailed reviews of both actuarial and non-actuarial grounds Genworth relied on to justify its premium rate increases. The Department offered Genworth a more modest 20% rate increase in 2020, which was in line with past approvals. If Genworth's rate filings were approved, Genworth would have become ineligible to request future rate increases for 3 to 5 years under the rules because its cumulative rate increases would have exceeded 150% of the original premium. Genworth declined to accept the Department's offer.

Both the ALJ and the Commissioner found unsupported Genworth's arguments that compliance with the mathematical requirements of the rules eliminates the standards of the LTCI Act. The LTCI Act empowered the Department to disapprove rates that are excessive, inadequate or unfairly discriminatory, in order to protect the public interest of the policyholders. In this matter, Genworth's policyholders were already paying higher premiums due to prior rate increases the Department approved in 2016 and 2017. If the 2020 premium rate increases were approved, Genworth's policyholders would see their premiums jump from $2,765 to $6,691 for one block of policies and from $2,200 to $5,831 for another block. Rate increases of that magnitude are higher than any of the Department's prior approvals and risk pushing the policyholders out of the market, thereby leaving remaining policyholders to

face even larger increases. Any rational person would conclude that imposing either a 142% or a 165% single year premium rate increase on our older population is excessive – that is just common sense.

As the ALJ and the Commissioner found, there was no need to promulgate separate rules to define the term excessive. Even Genworth's own expert witness testified at the hearing that whether a rate is excessive is based on actuarial standards accepted in the industry that are "spelled out pretty well" within the actuarial standards of practice ("ASOPs"). Genworth tries to dismiss the standards accepted in the ASOPs as "actuarial jargon" yet relied on those standards to secure rate increases in 2016 and 2017. Therefore, Genworth's arguments that it has been denied due process are unsupported.

The Department, the ALJ, and the Commissioner got it right. Their decisions were not arbitrary, capricious, or unreasonable. They applied the law and rules as written. Even if Genworth's filings meet the mathematical/minimum requirements of the rules to trigger a rate review, the final rates are not automatically approved. Genworth's 2020 premium rate increase based on its submissions to the Department were excessive and were based on newly adopted actuarial assumptions that lacked proven credibility. Thus, the Commissioner's disapproval should be affirmed.

PROCEDURAL HISTORY

On November 10, 2020, Genworth submitted to the Department two premium rate increase filings for its long term care policies through the System for Electronic Rates and Forms Filing ("SERFF").

Under SERFF tracking number GEFA-132598332, Genworth requested a premium rate increase of 142% on its Choice 2 long term care insurance policies issued on or after January 18, 2006. (Cra61-91) [1].

Under SERFF tracking number GEFA-132598347, Genworth requested a premium rate increase of 165% on its Choice 2 long term care insurance policies issued before January 18, 2006. (Cra249-275).

Between November 2020 and December 2021, the Department reviewed Genworth's premium rate increase filings, issued a series of disapproval letters ("Objection Letters") via SERFF, and provided Genworth with an opportunity to respond to inquiries from the Department. (Aa95-127; Cra24-59, Cra139-196; and Cra199-236).

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[1] "Aa" refers to Genworth's Appendix. "Ab" refers to Genworth's Brief. "Ra" refers to the Department's Appendix. "Cra" refers to the Department's Confidential Supplemental Appendix. Citations to the transcript of the hearings will be as follows: T1 refers to the transcript of the hearing conducted on January 27, 2023. T2 refers to the transcript of hearing conducted on January 30, 2023. T3 refers to the transcript of hearing conducted on February 9, 2023. T4 refers to the transcript of hearing dated February 10, 2023. The transcription service sequentially numbered the pages from page 1 on January 27, 2023, to page 798 on February 10, 2023.

On January 6, 2022, Genworth requested that the Department transfer the matter to the Office of Administrative Law ("OAL") as a contested case, (Cra197-198), which the Department did on March 23, 2022.

On January 27 and 30, and February 9 and 10, 2023, the ALJ presided over administrative hearings. (Aa53). Genworth and the Department filed post-hearing briefs and proposed findings of fact; thereafter, the administrative hearing record was closed.

On June 26, 2023, the ALJ issued an Initial Decision, finding that it was proper for the Department to disapprove Genworth's 2020 premium rate increase requests for both the pre-rate stability and rate stability filings because they were excessive under N.J.S.A. 17B:27E-11. (Aa53).

On November 9, 2023, Trish Wallace, Acting Commissioner for the Department, issued a Final Decision and Order ("Final Decision") disapproving Genworth's requested premium rate increases on its Choice 2 products. (Aa1). This appeal followed. (Aa166).

COUNTERSTATEMENT OF FACTS

Genworth is a national long-term care insurance company admitted in New Jersey that once offered Long Term Care Insurance ("LTCI") policies. (Ra359). As of December 31, 2019, Genworth had approximately 13,339 Choice 2 policies in force in New Jersey. Genworth brought this action to

challenge the Department's decision not to approve its 2020 premium rate increase requests for its Choice 2 policies. (Cra198). Genworth's premium rate increase requests were its third increase requested in four years. (Aa170 and 174).

A. Overview of LTCI Policies

LTCI policies are unique products in the healthcare insurance industry. They are often in force for decades before an insured makes a claim. LTCI policies defray costs of care provided in a nursing home, assisted-living facility, or home setting for policyholders who need assistance with activities of daily living, usually after suffering from illness or disability. (Ra499-500). Claims usually arise late in the policyholder's life. (Aa58). A typical policyholder maintains the policy by paying premiums over an extended period of time – often decades – before benefitting from the policy. (Ra501-502).

For new LTCI products, carriers set initial premiums using actuarial assumptions that project experience decades into the future, with the understanding that as claims arise and a carrier learns policy behavior, rate increases may be needed to realign premiums with experience. (Ra503). Factors used in calculating initial premiums include projected lifetime loss ratio, which is a term of art. The lifetime loss ratio is calculated as the present value of past and projected future incurred claims, divided by the present value and

projected earned premiums, creating a ratio. (T4:775:21 to 776:14). The lifetime loss ratio is exclusive of expenses, taxes or profits. (T3:662:16 to 663:3).

Over the past 20 years, carriers such as Genworth realized that they severely underpriced the market. Carriers failed to accurately predict the number of policy holders who voluntarily canceled their coverage (or let it lapse), the number of policies terminated due to death (mortality), the length of policyholder claims, the number of claims, and increases in interest rates and inflation. (Ra503-504). Fewer policies lapsed than expected, mortality was also lower than expected, claimants remained on claim longer, and claims occurred more frequently. As a consequence, carriers sought premium rate increases because their experience did not match their underlying assumptions. (Ra502-503).

B. The LTCI Act and Its Rules

Initial and future premiums for long-term care policies in New Jersey are governed by the LTCI Act, L. 2003, c. 207 (N.J.S.A. 17B:27E-1 to -13). Adopted in 2004, the LTCI Act was based on a Model Act adopted by the National Association of Insurance Commissioners ("NAIC") to regulate long-

term care insurance.[2] See New Jersey Assembly Committee Statement for Senate Committee Substitute for Senate Bills 2532 and 2594, December 11, 2003, and New Jersey Senate Committee Statement for Senate Committee Substitute for Senate Bills 2532 and 2594, June 12, 2003. (Ra1, 35 and 37). The Assembly and Senate versions added to the model act by providing that premium rates shall not be excessive, inadequate or unfairly discriminatory. (Ra35 and 37).

After the Legislature enacted the LTCI Act, the Department promulgated rules to implement it. (Ra108). The rules, N.J.A.C. 11:4-34.1, et seq., are based on the NAIC's Model Regulation (#641). (Ra40-41). The Department adopted the rules to establish the minimum requirements of information and calculations required to trigger the Department's review. (T3:599-19 to 601-3). The stated purpose of the rules is, among other goals, to promote the public interest, to promote the availability of long-term care policies, to protect applicants for long-term care insurance from unfair or deceptive sales or enrollment practices, and to establish standards for long-term care insurance. (Ra219). Critically, when the Department adopted the rules, it made it clear that "[t]hese rules are

[2] The NAIC is the United States standard-setting and regulatory support organization that was created in 1871 to coordinate regulation of multistate insurers. Members of the NAIC are state insurance regulators. Genworth has participated in NAIC meetings and initiatives as an interested carrier. (Ra39).

not intended to supersede the obligations of entities to comply with other applicable insurance laws insofar as they do not conflict with the Act." (Ra109).

Approval of carriers' initial rates or future rate increases are also guided by the NAIC's Guidance Manual for Rating Aspects of the LTC Insurance Model Regulation. (Ra231). This manual sets forth guidelines implementing the model regulation (#641) for initial and future rate increase filings. Under N.J.A.C. 11:4-34.8, 11:4-38.18, and 11:4-40.5, initial and future rate schedules must be supported by an actuarial certification signed by a member of the American Academy of Actuaries. N.J.A.C. 11:4-34-18(b). The actuary is required to submit an actuarial memorandum that sets forth the actuarial assumptions and information to support the rate increase request. The actuarial assumptions are guided by the ASOPs developed by the Actuarial Standards Board of the American Academy of Actuaries. (Ra242 and Ra263-285-). The ASOPs guide the preparation of initial and future rate filings.[3] (Ra291; 321 and

[3] Genworth's Expert witness, Allen J. Schmitz, FSA, MAA, testified during the hearing and submitted opening and rebuttal reports which were admitted into evidence. (Ra520). Schmitz is a principal and consulting actuary of Milliman, Inc. Schmitz stated in his report that "Milliman, Inc. and I have worked with Genworth on LTC insurance actuarial matters since the early 2000s". (Ra522). Schmitz reviewed a series of material for the conclusions in his reports, including ASOP 18, excerpts of the NAIC's LTC Insurance Model Regulations, and Excerpts of the NAIC Guidance Manual for the Rating Aspects of the LTC Insurance Model Regulation. (Ra526). A copy of the NAIC Guidance Manual is included in the Department's appendix. (Ra231).

344). Actuaries are also guided by publications of the American Academy of Actuaries. (Ra231).

C. Genworth's Choice 2 Policies

Genworth entered the LTCI market in New Jersey in 2004 and stopped writing new LTCI business in 2012. (Aa6). Genworth's Choice 2 policies consist of two groups: the first group comprises LTCI policies issued before January 18, 2006, known as "pre-rate stability" or "loss ratio" policies. (Aa6). The second group comprises LTCI policies issued on or after January 18, 2006, known as "rate-stability" policies. Both groups of policies are guaranteed renewal, meaning that Genworth cannot unilaterally cancel or change policy benefits as long as the policyholder continues to pay their premiums. (Ra361; Ra396; Ra429).

In order to balance the inherent risks associated with a guaranteed renewal policy, carriers such as Genworth typically reserve the right to increase premiums when necessary to respond to changes in "anticipated experience." (Ra396 and 457).

Before entering the LTCI market, Genworth set a target for the amount of the initial premium rate policyholders would have to pay to keep their policies active. Genworth priced its Choice 2 rate stability policies to achieve a lifetime loss ratio of 64.3%. (T1 217:11-23; T2 386:13 to 387:1; Cra294). The lifetime

loss ratio reflected Genworth's unilateral business decision based on its internal pricing strategy and actuarial assumptions. Using its 64.3% target meant that for every dollar Genworth received in premiums, it sought to pay $0.643 on claims and retain the remaining 35.7% ($0.357) for its expenses, risks, and anticipated profits. (T1 180:2-17).

When it priced its rate stability LTCI policies, Genworth included a margin for adverse experience (MAE), which is an additional premium percentage added as a cushion to avoid seeking a later rate increase request. Genworth used a MAE at 10%, which was customary in the industry. (T3 528:24 to 529:13). With the MAE, Genworth's annual initial premium rate for the pre-rate stability policies was $2,024, and the average annual premium rate for the rate stability policies was $2,077. (Ra512).

D. Genworth's 2016 and 2017 Rate Increase Requests

Slightly over a decade after it launched its Choice 2 product in New Jersey, Genworth realized that it had severely underpriced its product. Genworth responded to its pricing debacle by adopting a nationwide multiyear plan ("MYRAP") to obtain rate increases nationwide to support its claims-paying ability. (T1 61:17 to 62:24). Genworth's Vice President of its Long Term Care In Force Management division, Nick Sheahon, testified that Genworth used MYRAP as an initiative to review rate increases plans for

Genworth's largest LTC insurance block of business. (T1 61:17 to 62:24). With the MYRAP in place, Genworth's staff and actuary met with the Department to discuss Genworth's plan to increase rates in New Jersey. (T1 64:10 to 65:4).

In November 2016, Genworth requested a 76.8% premium rate increase on its Choice 2 policies. (Cra1). Genworth's actuary certified to the Department that its submission was prepared in conformity with ASOPs 8, 18, 23, 25, and 41, and that "the requested rates are not excessive, inadequate, or unfairly discriminatory." (Cra20). The Department approved a rate increase of 33.1% phased in over three years, which Genworth accepted. (Cra25).

In 2017, Genworth requested a 66.8% premium rate increase on its Choice 2 policies. (Cra34). Genworth projected that its lifetime loss ratio without the rate increase for these policies would be 81.2%. (T3 617:1 to 619:23). Genworth noted that its filing was based on its negative experience and changes to its actuarial assumptions about morbidity, voluntary termination rates, and mortality, which were revised from its 2015 and 2016 set of assumptions. (Cra34-39). Again, Genworth certified to the Department that its submission complied with all actuarial standards and that its rates are "not excessive or unfairly discriminatory." (Cra53). The Department approved a rate increase of 8.68% phased in over two years. (Cra57-58).

E. The 2020 Rate Increase Applications

In November 2020, Genworth requested premium rate increases for both its rate stability and its pre-rate stability policies. Genworth sought a 142% premium rate increase for its rate stability policies and a 165% premium rate increase for its pre-rate stability policies (collectively, the "2020 Filings").[4] (Cra61-63 and Cra249). The 2020 Filings were submitted less than three years after Genworth requested its 2017 premium rate increases. When combined with previously approved rate increases, Genworth's 2020 post-rate stability requested premium rate increase represented an aggregate increase of 175% from its original pricing. Similarly, Genworth's 2020 pre-rate stability premium represented an aggregate increase of 174% from its original pricing. Genworth does not dispute these facts.

Genworth's 2020 Filings were part of its goal to achieve a 150% nationwide premium rate increase for its Choice 2 policies under MYRAP. (T1 186:14 to 187:180). If Genworth did not achieve its goal, it warned the Department that it would need future significant additional rate increases. Ibid. The ALJ and the Commissioner found that as of December 9, 2021, only

[4] Through the 2020 Filings, Genworth pursued the balance of the portion of prior rate increase requests that were previously disapproved. Genworth disclosed that it had made material changes to several actuarial assumptions to support the magnitude of its requested rate increase. (Cra61 and Cra249).

seventeen states had approved rates at or above this goal, and less than half had done so by November 2022. Ibid. In its 2020 Filings, Genworth increased its MAE from 10% to 15%. (Cra81; Cra144; T1 209:7-9).

Genworth supported its 2020 Filings with actuarial memoranda signed by its senior pricing actuary. For each filing, Genworth's actuary stated that the "memorandum has been prepared in conformity with all applicable Actuarial Standards of Practice, including ASOP No. 8, 18, 23, 25 and 41, relied on assumptions developed by Genworth's actuaries, and certified the opinion that the rates 'are not excessive or unfairly discriminatory.'" (Cra88 and Cra 273).

Genworth offered new forms as an alternative to the new higher rates it proposed to charge to its policyholders. The forms included a new reduced benefit option ("RBO") and a flexible benefit option ("FBO"). Genworth's proposed RBO would offer policyholders customized options to adjust their benefits to maintain approximately the same premium cost, by reducing the maximum benefit amount and reducing the benefit period. (Cra92-115). Genworth's FBO would allow policyholders to mitigate the proposed premium increase by, among other options: (1) guaranteeing rate premiums only until January 1, 2025, (2) varying the monthly indemnity payments by type of benefit, and (3) obligating Genworth to only pay one benefit in a given calendar year. Ibid.

Genworth noted that insureds seventy-five years and older were a "key driver" in seeking the rate increases, having higher than expected incident rates. (Cra62-63; Cra250-251). Within each of its 2020 actuarial memoranda, Genworth highlighted in a chart its newly adopted actuarial assumptions:

Year	Updated in Assumptions Due To
2014	Lower Claim Termination Rates (CTR) in later durations Higher Benefit Utilization Rate (BUR) in later durations
2015	Lower Voluntary Lapse Lower Active Life Mortality
2016	Lower CTR BUR methodology change
2017	Incidence differential for Lifetime and Non-Lifetime benefit period
2018	Lower CTR
2019	New Choice 2 &2.1 incidence assumption with improved fit by age and duration

(Cra62 and Cra250).

The magnitude of Genworth's proposed premium rate increases was unprecedented. The premiums would more than double for the policyholders if Genworth's requested increases were to be approved. (Cra270 and Cra 316). Genworth does not dispute that for its Choice 2 rate stability policies, it had approximately 11,635 policies in force. (Cra61). The average annual premium in 2020 for these policies was $2,765. If the Department approved the 142% increase, the average yearly premium would jump to $6,691. (Cra85).

Genworth also does not dispute that for its Choice 2 pre-rate stability policies, it had nearly 1,755 policies in force upon filing. (Cra249). If the Department approved the 165% increase, the average yearly premium would jump to $5,831. (Cra270). For a hypothetical 75-year-old policyholder, who currently pays $16,106.40 yearly for a loss ratio policy and $19,725.45 for a rate stability policy, the annual premiums would exceed $40,000 for both blocks if the requested premium rate increases were approved by the Department.

F. Genworth's 2020 Accumulated Income

Genworth's actuarial memorandum was revealing. By the time of its application to the Department, Genworth had accumulated far more in total premiums versus what it actually paid in claims from policy inception to the 2020 rate increase request. For the rate stability filing, the actuarial memorandum disclosed that since its original release of its policy Genworth had accumulated $12,552,344,237 in total premiums with past rate increases nationally. (Cra91). Based on the original premiums alone, Genworth had accumulated $12,280,025,859 in premiums. Ibid. Accordingly, Genworth gained $272,318,378 over the initial premium rates based on past premium rate increases approved by the Department. Ibid. In its 2020 Filings, Genworth sought to achieve a total of $19,483,943,228 as the present value of future premiums nationally, including approved and requested rate increases.

(Cra91). In comparison, by 2019, Genworth had only incurred $1,895,860,186 in total claims nationwide. Ibid. These claims represented only approximately 15% of the $12,280,025,859 in premiums received by Genworth under the original premium rates. Ibid. For the rate stability policies in New Jersey issued after January 2006, Genworth accumulated $36,848,527 in earned premiums and $36,764,066 in written premiums, including prior approved rate increases without MAE. (Cra572). Yet, Genworth only incurred $15,390,328 in claims and only paid $7,556,001 in claims. Ibid. Accordingly, Genworth's loss ratio was only 41.8% when it filed the 2020 rate increase.

Genworth's claims paying ability appears to have certainly improved through its MYRAP and work with the NAIC.[5]

[5] In 2024, Genworth's President & CEO, Thomas McInerney, highlighted Genworth's work with the NAIC to achieve long-term care rate approvals nationwide. (Ra557 and 558). Genworth was heavily involved in the creation of a multi-state actuarial (MSA) review developed by the NAIC to address state regulator reviews of long-term care rate applications. (Ra554). According to McInerney, through MYRAP and the MSA, Genworth was able to obtain "$354 million in premium rate increase approvals in 2023, well above the company's projected amount of $275 million in the fourth quarter from rate increases that totaled $127 million from 13 states with an average percentage increase of 75%." (Ra558). Genworth credited its stronger financial position to positive trends in policyholder benefit reductions and rate actions contemplated by its MYRAP strategy and litigation settlements, which accounted for $2.5 billion in growth in 2023. (Ra560).

G. The Department's Rate Review

The Department's review of the 2020 Filings tracked traditional steps for rate/form filing and reviews for all carriers. In accordance with N.J.A.C. 11:4-40.5, "[a] form/rate filing shall be deemed approved upon the expiration of 60 days following submission of the filing to the Commissioner unless the Department approves or disapproves the filing in writing within that 60-day period." Ibid. Based on that procedure, the Department reviewed and disapproved of Genworth's rate filings by letters which were uploaded to SERFF. (Aa95 to 127).

The Department disapproved both the FBO form request and the rate increase request and provided an opportunity for Genworth to justify its rate increase. Ibid. Among other grounds, the Department requested that Genworth provide the actuarial credibility method for all significant assumptions, justification based on ASOP #18, original and current expenses, and profit assumptions. (Cra141-151). Genworth responded. Genworth's response triggered the Department's 30-day review period. If the Department did not approve or disapprove the resubmission, the form and rate request would be deemed approved. The Department adhered to this procedure, which is set forth in N.J.A.C. 11:4-40.5(d) and (e), throughout the rate review period.

The Department disapproved Genworth's premium rate increase on January 8, 2021. (Aa95). Afterwards, the Department provided Genworth with opportunities to provide information and reasons why the premium rate increase should be approved. (Cra152-240 and Cra276-395). Genworth's responses and the Department disapproval letters after January 8, 2021, made it quite clear that the magnitude of Genworth's premium rate increases had triggered alarms. (Cra284-294 and Cra347-348). Genworth stated that the "amount requested in this filing is supported by actuarial regulations as the maximum amount that can be supported." (Cra293). When asked to explain whether the assumptions had been set at an aggressive end of a reasonable range, Genworth stated that it "limits its request to rate level that gets lifetime ratio back to original pricing with 15% MAE" and that it "intends to use profits from this block to pay claims for other [Genworth] business." (Cra348; Cra354 and Cra175).

Having reviewed and considered all of Genworth's information, the Department stated in its December 21, 2021 letter:

> Your assumption regarding the acceptable maximum lifetime loss ratio of 64.3% represents an aggressive loss ratio target. Genworth's positions to both bring the lifetime loss ratio closer to the original pricing target and to use profits from this block to pay claims for other Genworth business do not represent an intent for Genworth to share the burden of the unfavorable performance for these policies with the policyholder (your response to our Objection 47). The Department

> expects carriers to share materially in the unfavorable performance.
>
> [Aa121]

The Department's chief actuary, Seong-Min Eom ("Eom"), explained the Department's position. During the rate filing review phase, Eom offered a 20% rate increase on the pre-rate stability filing on a phone call with Genworth. (T3 623:4-14). The Department's offer to approve a lower rate increase was consistent with historical approvals, whereas approval of the requested rate (which is multiples higher than any prior approval by the Department) would be unprecedented. Further, the FBO form was submitted with the rate stability filing, though it would have applied to both the rate stability policies and the pre-rate stability policies. (T1 222:11-223:11; T3 589:10-24). That type of submission was improper under the rules. The Department requested that Genworth modify the form request to a 0% premium rate increase for the rate stability policies, so it could approve the form, but Genworth declined the Department's offer. (T3 589:16 to 590:19). The Department needed to approve the forms before it could address the increase for the pre-rate stability policies.

H. The ALJ's Decision

The ALJ found the testimony of the witnesses to be credible, including the testimony of the parties' expert witnesses. (Aa56). The ALJ found that the Department had used a proportional approach, agreeing to increase the premiums on the Choice 2 pre-rate stability block by approximately 20% to bring it closer to the earlier increase level approved for the Choice 2 rate stability block, as they are the same product and premiums should be similar for consumers. (Aa70). Pursuant to N.J.A.C. 11:4-34.18(d) and (e), Genworth could seek another increase in a year or so on the rate stability policies, giving Genworth enough time to gauge its experience under its revised assumptions and projections. (Aa71). If the Department approved a rate increase on the rate stability policies, Genworth would be ineligible to apply for a rate increase for another three to five years, depending on the percentage increase, given the annual reporting requirements under N.J.A.C. 11:4-34.18(d) and (e). Ibid. If the cumulative rate increase was over 150% of the original filing, Genworth would become ineligible under the rules to seek another premium rate increase before the expiration of 3 or 5 years. (Aa71).

The ALJ agreed that Genworth's actuarial memoranda certified that Genworth's requested rate increases were not "excessive or unfairly discriminatory." Id. at 20. Under ASOP No. 8, rates are considered excessive

if they exceed the rate needed to pay claims, administrative expenses, taxes, regulatory fees, reasonable contingency, and profit margins. (Aa72).

The ALJ stated that the Department characterized Genworth's requested rate increases as "excessive." Ibid. Genworth's target lifetime loss ratio of 64.3 %—its goal with its original pricing—is excessive because of the incorrect assumptions that caused the company to underprice its products and fall short of this target, even though this was an industry-wide occurrence. Ibid. Genworth's requested rates even exceeded the amount needed to cover the cost of claims, expenses, and profits by seeking to recoup past losses or unfavorable claim experiences to obtain its original target lifetime loss ratio of 64.3%. Ibid. Schmitz, Genworth's expert witness, acknowledged that it can take months or a year to develop sufficient credibility for assumptions and projections because any company must review data. Ibid.

Schmitz also testified regarding his understanding of the requirement, pursuant to N.J.S.A. 17B:27E-11, that rates must not be excessive, or unfairly discriminatory. (T2 451:19 to 452:1). He testified that:

> to the extent an actuary is looking for additional guidance on those things, those particular items are spelled out pretty well within the ASOPS, and in ASOP 8, specifically. And what constitutes excessive, inadequate or unfairly discriminatory, you know. And based on those definitions in ASOP 8, Genworth rates definitely are not excessive, inadequate, or unfairly discriminatory. [T2 452:1-9].

The ALJ concluded that Genworth's data to support the credibility of those assumptions had yet to be fully developed.

I. The Commissioner's Decision

The Commissioner adopted the ALJ's initial decision. (Aa52). The Commissioner found that the findings are supported by the administrative record developed during the hearings. (Aa3). The Commissioner made additional findings that Genworth's increase of MAE from 10% to 15% results in a higher increase that could not be justified and that Genworth wanted to maximize its premiums, more than doubling them for many policyholders, and use profits to pay for other lines of insurance. The Commissioner further explained that in line with the Legislature's intent and concern with promoting the public interest and protecting the public when it passed the LTCI Act, rate filings are not automatically approved even if their calculation meets the requirements in the rule. The LTCI Act still requires the Commissioner to measure whether rates are excessive, among other concerns to be addressed. N.J.S.A. 17B:27E-11.

Accordingly, the Commissioner concluded that Genworth's premium rate requests were excessive under both the commonsense meaning of the term "excessive" as well as under the meaning ascribed to that term by an actuary in the industry. The Commissioner rejected Genworth's claims that the Department engaged in administrative rule making and exceeded its authority

under the LTCI Act. The Commissioner further concluded that the Department was not obligated to use the word "excessive" in its findings. Genworth was not free to ignore the hardship that would be experienced by policyholders and ignore both the ordinary, dictionary meaning of the word excessive and its actuarial counterpart.

This appeal followed.

ARGUMENT

THE COMMISSIONER'S FINAL DECISION AND ORDER IS REASONABLE AND SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

Genworth asks this court to reverse the Department's disapproval and substitute its own conclusions for those reached by the Department on the basis of its actuarial expertise. Genworth's burden is particularly high, especially given the clear statutory language and standards reflected in the LTCI Act. The Department plainly has authority and discretion to reject rates that are excessive.

Genworth knew that its triple digit, single year rate increase request (which included its non-customary and aggressive 15% MAE) raised red flags. That is precisely why Genworth tethered its requested premium rate increases to accompanying benefit reductions to mitigate the "sticker shock" that might be visited upon policyholders who are older and on fixed incomes.

Genworth invites this court to approve its requested rate increase, thereby displacing the Department's expertise with Genworth's own self-interests. However, the Department correctly found that Genworth's compliance with the calculations under the rules did not compel the automatic approval of the requested rates. To the contrary, in enacting the LTCI Act, the Legislature granted the Department the express authority to disapprove rates that are excessive. As the Commissioner found, the Department's disapproval is

supported by substantial, credible evidence, and the Commissioner's decision should therefore be affirmed.

The scope of appellate review of an agency's decision is exceptionally narrow. The New Jersey Supreme Court has recognized that "[i]n light of the executive function of administrative agencies, judicial capacity to review administrative actions is severely limited." See Mazza v. Bd. of Trs., Police & Firemen's Ret. Sys., 143 N.J. 22, 25 (1995); see also Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (citing Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)).

Appellate courts review agency decisions under the heightened arbitrary and capricious standard. See Melnyk v. Bd. of Educ. of the Delsea Reg'l High Sch. Dist., 241 N.J. 31, 40 (2020). "An agency's determination on the merits will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record. Saccone v. Bd. of Trs., Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014) (quoting Russo, 206 N.J. at 27); Zimmerman v. Sussex Cnty. Educ. Servs. Comm'n, 237 N.J. 465, 475 (2019). Here, Genworth bears the burden of making a showing of three inquiries:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which

> the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
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> [Allstars Auto. Grp., 234 N.J. at 157 (quoting In re Stallworth, 208 N.J. 182, 194 (2011)); see In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 383 (2013); Mazza, 143 N.J. at 25.]

Because Genworth fails to make that showing, the Department's decision should be affirmed. The Department's review complies with the law, is based on a substantial evidentiary record that was developed based on Genworth's submissions, and closely follows the policy established by the Legislature. The Legislature granted the Department the discretion to balance the interests of both the carrier and the policyholder in furtherance of its public policy to protect the interests of policyholders. The Department's disagreement with Genworth's submission is sound and carries with it a strong presumption of reasonableness and deference. City of Newark v. Nat. Res. Council, Dep't of Env't Prot., 82 N.J. 530, 539 (1980). The presumption arises where, as here, the agency is exercising its statutorily delegated responsibility. See In re Musick, 143 N.J. 206, 216 (1996) (noting the deferential review standard is consistent with the Judiciary's "limited role . . . in reviewing the actions of other branches of government"); see also In re Herrmann, 192 N.J. 19, 28 (2007); see In re Request to Modify Prison Sentences, 242 N.J. 357, 390 (2020) ("Wide discretion is

afforded to administrative decisions because of an agency's specialized knowledge").

As the administrative agency designated to enforce the public policies underlying the LTCI Act, the Department's decision making is entitled to substantial deference. E. Bay Drywall, LLC. v. Dep't of Labor & Workforce Dev., 251 N.J. 477, 493 (2022). "This deference comes from the understanding that a state agency brings experience and specialized knowledge to its task of administering and regulating a legislative enactment within its field of expertise." In re Election Law Enf't Comm'n Advisory Op. No. 01-2008, 201 N.J. 254, 262 (2010). See also Murray v. State Health Benefits Comm'n, 337 N.J. Super. 435, 442 (App. Div. 2001) (quotation marks omitted) (quoting In re Vineland Chem. Co., 243 N.J. Super. 285, 307 (App. Div. 1990)). "Particularly in the insurance field, the expertise and judgment of the Commissioner may be allowed great weight." N.J. Healthcare Coal. v. N.J. Dep't of Banking and Ins., 440 N.J. Super. 129, 135-36 (App. Div. 2015).

A. Neither the ALJ nor the Commissioner Rewrote the Rationale for the Department's Disapproval.

Genworth argues that the ALJ and the Commissioner's decisions are in error because of the lack of formality of the Department's disapproval letter. (Ab15). Genworth's chief complaint is that the Department's December 2021 letter, which stated that the rate requests "remained disapproved," did not

explicitly use the word "excessive" and that the disapproval was based on a completely different rationalization. (Ab16-17). Genworth's position elevates form over substance.

1. The Department's Disapproval Letters Adequately State the Grounds for the Department's Determination.

As required by N.J.A.C. 11:4-34.18, the Department's decision was informed by the review of all information and data Genworth submitted via SERFF. Genworth's premium rate increase filings triggered the Department's authority to review whether or not Genworth submitted "sufficient information for review and approval of the premium rate schedule increase by the Commissioner." N.J.A.C. 11:4-38.18(b)(5). Genworth requested the Department to consider all justifications for its premium rate increases, which reflected a combination of new actuarial assumptions, new calculations of loss ratio under the rules, explanations as to why its past assumptions failed, and consideration of non-actuarial factors such as the proposed RBO and FBO. And the Department did that review and found Genworth's justifications for its unprecedented rate increase requests lacking.

The Department's disapproval letters, labeled "Objection Letters" when uploaded to SERFF, put Genworth on notice of the Department's reasons for disapproval of the premium rate increase requests. From the very beginning, in the January 8, 2021 disapproval letter, the Department set forth in numbered

paragraphs the reasons why the premium rate increase request was disapproved. (Aa96). The Department offered Genworth an opportunity to clarify its position or to provide information that was missing for its premium rate increase requests, as filed. The Department's March 30, 2021, disapproval letter then zeroed in on the amount of Genworth's premium rate increase request. The Department focused on Genworth's targeted loss ratio, actuarial assumptions (such as morbidity, mortality, benefit utilization, and claim termination rate), and why the "acceptable maximum lifetime loss ratio" of 64.3% is not an acceptable target. (Aa103).

The history of the communications between the Department and Genworth demonstrates that Genworth was well aware that the steep degree of its requested rate increases was at issue. In disapproval ground number 47, the Department asked Genworth to explain why the components of the remaining 35.7% of the lifetime loss ratio that goes to its profits, risk and expense were acceptable. (Cra175). That question struck at the heart of the Department's judgment as to whether or not Genworth's premium rate increase request was excessive. Genworth responded by admitting that its "rate request level" was the maximum selected to get it back to its original lifetime loss ratio of 64.3%, with the 15% MAE that was beyond customary norms, and that they intended to use profits from premiums paid by Choice 2 policyholders to pay claims for other Genworth

business. (Cra171-175).

The moment Genworth submitted its actuarial memoranda and offered its opinion that its premium rate increases were not excessive under actuarial standards, Genworth was on notice that the opinion would be tested by the Department and that whether its rate increase request was in fact excessive would be determined.

Even if the disapproval letters were not organized to Genworth's liking, that does not warrant remand. There are sufficient facts within the documentary evidence before the Department from which to support its decision. (T3 586:17 to 587:8; 589:10 to 590:19). And as long as "[the court] and the interested parties can and do understand fully the meaning of the decision and the reasons for it, no sufficient reason exists to remand for fuller and clearer findings and later reconsideration." Application of Howard Sav. Inst. of Newark, 32 N.J. 29, 53 (1960) (declining to remand even though agency findings were "not nearly so clear, full and well organized" as could be expected). Surely a sophisticated carrier such as Genworth, who employs teams of actuaries, cannot claim that it did not understand that the level of its premium rate increase was an issue before the Department.[6]

[6] It has remained the Department's position that in terms of the mechanics of Genworth's premium rate filing, Genworth followed the rules insofar as its

Genworth relies on N.J. Bell Tel. Co. v. Commc'n Workers of America, N.J. Traffic Division, 5 N.J. 354, 375 (195), to argue that the ALJ and the Commissioner improperly supplied "by implication" a basis for the disapproval decision—by reading in a finding of excessiveness—that was not stated in the Department's own letter. N.J. Bell concerned judgments based on arbitration awards in employer-employee matters, entered by the Board of Arbitration. The problem in that case was that the Board's findings did not contain factual data to determine whether its conclusion was supported. That is not the case here. In this case, the Department specifically relied on the factual data, the actuarial assumptions, and all information that Genworth submitted via SERFF to support its extreme premium rate increase request. Unlike the facts before the Court in N.J. Bell. The Department's conclusions were adequately supported by the record.

Also distinguishable is In re Issuance of a Permit by Dep't of Envtl. Prot. to Ciba-Geigy Corp., 120 N.J. 164 (1990), relied on by Genworth. (Ab18). The

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calculations conformed to the mathematical formula of the minimum loss ratio set forth in the rules, based on the new actuarial assumptions and methodology it adopted. (T3 599:12 to 600:25). Compliance with those calculations did not require the Department to automatically approve the extreme premium rate increases requested, however, especially given that Genworth's slate of new assumptions lacked proven credibility under ASOP 25. (T3 713:1 to 20). Blindly approving Genworth's request would have been completely out of line with past practices by the Department.

appellant in that case challenged a decision by the DEP about compliance with the discharge of pollutants. However, the DEP conceded that it did not apply the federal Ocean Discharge Criteria to determine whether a violation of the Clean Water Act had occurred. By comparison, here, the Department made no comparable concessions and in fact engaged in the statutorily required inquiry into whether rates were excessive, inadequate, or unfairly discriminatory—and Genworth was on notice that the Department was questioning the level of its requested premium rate increases all along.

To be sure, Genworth cites cases for the general idea that due process requires that regulated parties have notice of the evidence upon which an agency will rely as well as an opportunity to know about and respond to evidence against it. (Ab19 (citing Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281 (1974), and Moore v. Dept. of Corr., 335 N.J. Super. 103, 108 (App. Div. 2000)). But that does not help Genworth because the record here shows that: (1) Genworth knew from the Department's communications that the Department was questioning the excessiveness of Genworth's requested rate increases, the credibility of its assumptions, and the impact on policyholders; (2) Genworth had ample opportunity to answer the Department's questions and supply missing information; and (3) Genworth in fact submitted its actuarial memoranda and purported to opine on the reasonableness of the proposed rates.

Indeed, in Bowman (which Genworth itself cites), the U.S. Supreme Court rejected claims of unfair surprise where the aggrieved party claiming surprise had offered its own expert study on qualifications in anticipation that the agency might address the issue during the administrative review. 419 U.S. at 288 n.4. Here, too, Genworth's submissions anticipated that it would have to justify the level of the increased rates it was requesting, and thus Genworth cannot now claim ignorance of the standards by which the Department would review its submission.

On balance, the record before this court certainly does not call for a remand of the sort addressed by the District Court in Friedler v. Gen. Serv. Admin., 271 F. Supp. 3d 40, 57 (D.D.C. 2017). (Ab19). In that case, a government contractor was debarred from all federal contracting, but the Government Accounting Office changed course at the end of three years of negotiation to advance new grounds for his debarment. There is no change of course here. As Eom testified at the hearing, the extremeness of Genworth's rate increase request during the rate review process supported the conclusion that Genworth's rate request was excessive. (T3 585:18 to 587:8). Genworth was on notice why its premium rate increase requests were disapproved. Therefore, reversing the Commissioner's decision is unnecessary when, at bottom, Genworth's challenge boils down to second-guessing the excessiveness

determination that the Legislature entrusted to the Department to make.

B. The Department's Excessiveness Determination was Well-Grounded in Its Expertise and Concern for Policyholder welfare.

The Department based its December 2021 disapproval on multiple grounds explained in numbered objections and questions during the review phase. Genworth had every opportunity to respond to the disapproval grounds and cannot realistically claim a lack of due process to establish that its rates were not excessive. N.J.S.A. 17B:27E-11. For its part, the Department had an obligation to promote the Legislature's expressed policy to safeguard the public welfare. The Department used its expertise in insurance to exercise broad regulatory authority over whether or not a rate increase should be approved. See Applied Underwriters Captive Risk Assurance Co., Inc. v. N.J. Dep't of Banking & Ins., 472 N.J. Super. 25, 42 (App. Div. 2022) (recognizing the Department's broad regulatory authority over the business of insurance).

During the rate review process, Genworth took particular exception to the Department's alleged lag in matching other state insurance regulators which had granted substantial rate increases on its Choice 2 policies. (Cra235-237). But that is not how rate filing reviews work. The Department was obligated to determine independently whether approval of Genworth's extreme rate request was justified. It was not. With the rate request being so high, there was a clear risk that healthy policyholders would allow their policies to lapse, which then

would force unhealthy policyholders to have to shoulder even higher rate increases. The impact of the requested rate increases defied the common-sense and ordinary meaning of the word excessive. Genworth tried to explain its rationale for seeking its unprecedented rate increase, stating:

> [T]he rate request is based on the current best estimate assumptions, combined with a 15% margin for adverse experience and follows actuarial regulations related to certifying the premiums and passing the dual loss ratio test requirements. Using the best estimate assumptions, the proposed rate increase results in a lifetime loss ratio that exceeds the original pricing, which is defined in our response as the maximum rate increase supported by best estimate assumption and regulation.
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> [Cra178 (emphasis added).]

The rules only set the minimum loss ratio tests that carriers must meet; they do not address the outer limit of whether or not a rate is excessive. That outer limit is a judgment call by the Department, which was committed to the Department by the Legislature's grant of authority in the LTCI Act. Eom testified that during the rate review process, Genworth's response that it intended to use profits from this block to pay claims for other business signaled that the rate request was excessive under the common-sense understanding of that adjective because the request went beyond what was usual, proper, or necessary to enable it to pay claims under its LTC policies. Any argument that Genworth lacked notice that its premium rate increase request might be

considered to be excessive is nonsensical.

C. The Department Was Not Required to Adopt Rules as to Excessiveness.

Genworth argues that the Department has not provided any guidance to regulated entities about what the statutory term "excessive" means. (Ab23). Disregarding tried and true canons of construction of agency rules and their associated statutes, Genworth claims that it lacked sufficient notice of how that term would be construed and contends that the long-term care industry is left without direction or guidance from the Department. Genworth's narrative on this point should be rejected.

1. The Department's Promulgated Rules Fulfilled the Department's Obligation to Provide Guidance about the Rate Review Process.

The NAIC's model regulations for premium rate schedule increases, adopted at N.J.A.C. 11:4-34.18, established the minimum required information to be submitted and calculations to be performed by carriers like Genworth. The purpose of the regulations was to standardize the premium rate review process that could be followed by all long-term care insurance carriers and not favor one versus another. The Department as an agency possesses "expressly granted" powers and "those incidental powers which are reasonably necessary or appropriate to effectuate the specific delegation," and "to enable [it] to accomplish its statutory responsibilities." N.J. Guild of Hearing Aid Dispensers

v. Long, 75 N.J. 544, (1978). Agency rules are accorded a presumption of validity and reasonableness. In re Petition of N.J. Am. Water Co., 169 N.J. 181, 188 (2001); In re Adoption of N.J.A.C. 7:26B, 128 N.J. 442, 449 (1992).

When reviewing an administrative agency's promulgation of a rule, it is not this court's function "to assess the wisdom of the agency's decision, but only its legality." N.J. Ass'n of Nurse Anesthetists, Inc. v. N.J. State Bd. of Med. Exam'rs, 183 N.J. 605, 610 (2005). The function of this Court is to rule on whether the subject matter falls within the substantive authority delegated to the agency and whether the rule was enacted in accordance with applicable legal principles." Ibid.

Questions about the purpose of the rules, the standards adopted and the principles underlying them were more than adequately addressed decades ago in the public comment period before they were adopted. (Ra108 and 188). As the Department pointed out in its responses to comments, the Rule is designed to strike the proper balance between the carrier and interests of the policyholders:

> The purpose of these rules is to promote the public interest, to promote the availability of long-term care policies, to protect applicants for long-term care insurance from unfair or deceptive sales or enrollment practices, to establish standards for long-term care insurance, to facilitate public understanding and comparison of long-term care insurance policies, and to facilitate flexibility and innovation in the development of long-term care insurance coverage. [Ra109].

Clearly, the adoption of the rules fulfilled the Department's obligation to provide guidance to carriers about the rate review process.

2. There is No Need to Separately Define "Excessiveness".

There was no need for the Department to define the term excessive. Certainly, the Legislature knew that to be true. In enacting the LTCI Act, the Legislature added language to authorize the Commissioner to determine whether rates are excessive. Indeed, the starting point in statutory construction is to read the words chosen by the Legislature in the LTCI Act in accordance with their ordinary meaning. Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 553 (2009). Ordinary meaning prevails unless the Legislature has used technical terms, or terms of art, which are construed "in accordance with those meanings." In re Lead Paint Litig., 191 N.J. 405, 430 (2007); see also N.J.S.A. 1:1–1 ("[W]ords ... having a special or accepted meaning in the law, shall be construed in accordance with such ... meaning.").

Genworth tries to cast doubt over the meaning of the term excessive because neither the Legislature nor the Commissioner separately defined that term. However, using traditional norms of statutory construction, the aim is to effectuate the Legislature's intent. Gilleran v. Twp. of Bloomfield, 227 N.J. 159, 171 (2016). Thus, the "best indicator" of legislative intent "is the statutory language." State v. Lane, 251 N.J. 84, 94 (citing DiProspero v. Penn, 183 N.J.

477, 492 (2005)). Courts ascribe to the statutory words their ordinary meaning and significance and read them in context with related provisions so as to give sense to the legislation as a whole. DiProspero, 183 N.J. at 492. See also In re Plan for Abolition of the Council on Affordable Hous., 214 N.J. 444, 468 (2013).

The Legislature is presumed to have knowledge of its existing legislation and long-standing enactments. Chase Bank U.S.A., N.A. v. Staffenberg, 419 N.J. Super. 386, 402 (App. Div. 2011). The Legislature has used the term "excessive" and, specifically, the phrase "excessive, inadequate or unfairly discriminatory" in several laws on the books in New Jersey, but with no need to separately define the term each time. See N.J.S.A. 17:29AA-10, (Rates shall not be excessive, inadequate or unfairly discriminatory); N.J.S.A. 17:48C-21 (Commissioner can determine if the rates are excessive, inadequate or unfairly discriminatory); N.J.S.A. 17:29A-7 (initial rating systems) and 17:29A-14 (altered, supplemented, or amended rating systems) also set forth the "excessive, inadequate or unfairly discriminatory" standard; N.J.S.A. 17:29A-46 (providing an expedited process that will not produce rates that are excessive, inadequate for the safety and soundness of the insurer, or unfairly discriminatory between risks in the State involving substantially the same hazards and expense elements.); and N.J.S.A. 17:48F-5 (changes to charges under any contract shall be established in accordance with sound actuarial principles and shall not be

excessive, inadequate, or unfairly discriminatory).

On the administrative side, the adjective "excessive" itself has not been separately defined, which makes sense given that its ordinary meaning is easily ascertainable. Separate definitions have only been created for specialized terms that incorporate the qualifier "excessive" as part of a specific concept. See N.J.A.C. 7:9A-2.1 (defining "excessively course horizon"); N.J.A.C. 11:3-20.3 (defining "excess liability and non-excessive subsidization"); N.J.A.C. 7:22-6.4 (defining "excessive infiltration/inflow"); N.J.A.C. 13:45A-26F.2 (defining "excessive wear and tear").

Certainly, if the Legislature saw the need to define the term "excessive," it could have done so, but here it chose not to. That is understandable, especially given that neither the NAIC Model Act nor the model regulations define the term "excessive" or the phrase "excessive, inadequate or unfairly discriminatory." Instead, the NAIC and the American Academy of Actuaries hold actuaries to the standards in the ASOP as a means for determining initial and future rate filings. (Ra254-256; Ra263; and Ra276-281). In the context of long-term care insurance, ASOP 8 provides the operable guidance, in defining when a rate is considered to be "excessive," especially if the ordinary and common-sense meaning of the term is confusing, which it is not. The regulations and the actuary's standard of practice specifically identify the

actuarial nature of establishing premium rate increase and inform when a rate might be considered excessive. (Ra291).

Practically speaking, this should end Genworth's arguments suggesting that the Department should adopt either a range of rates deemed presumptively non-excessive, as contrasted with the "loss ratio" standard (N.J.A.C. 11:4-18.5) or the calculations in determining loss ratios (N.J.A.C. 11:4-34.17). Hard and fast percentages would destabilize the rate review process by turning a blind eye to the claims paying ability experienced by different carriers. That was precisely the point Genworth argued recently to the Supreme Court of New Hampshire in Genworth Life Ins. Co. v. the State of N.H. Dept. of Ins., 174 N.H. 78 (2021). (Ra527). In its opening brief to the New Hampshire Supreme Court, Genworth argued as being constitutionally invalid New Hampshire's insurance regulations, which superimpose on the expected loss ratio standards mandatory rate caps that limit the magnitude of any increase over a three-year period. (Ra530-541). The caps are based solely on the attained age of the policyholder, without regard to whether greater rate increases are actuarially justified and necessary to achieve rate adequacy. The New Hampshire Supreme Court agreed with Genworth, finding that the amended regulations make no exception for LTCI policies that require increases in excess of rate increase caps, do not afford the Commissioner discretion to approve rate increases that exceed the cap, and

were ultra vires. 174 N.H. at 88-89. (Ra550-553).

Genworth's arguments in New Hampshire completely undermine its position here that the Commissioner should promulgate rules as to the term excessive and adopt standards that might thwart flexibility. Precise formulas, N.J.A.C. 11:3-20.6, measures used in small employer benefit program insurance, N.J.A.C. 11:21-9.5, measures of excessiveness defined by dollars of excess profit N.J.A.C. 11:3-20.3, or premium reductions N.J.A.C. 11:21-9.5, all of which are cited by Genworth on pages 28-31 of its brief, are unworkable in the long-term care market. They are unworkable because in the long-term care market, the pricing of policies is heavily dependent upon actuarial assumptions and judgment. Those characteristics would not benefit from hard and fast rules of the type Genworth urges on appeal, because they would stifle the flexibility and balance called upon by the Legislature to weigh the carriers' and policyholders' interests in setting policy premiums.

Genworth's arguments that it lacked advance knowledge of the standards of excessiveness are unsupported. Genworth cites to Boller Beverages, Inc. v. Davis, 38 N.J. 138 (1962), and In re Farmers' Mut. Fire Assurance Ass'n of N.J., 256 N.J. Super. 607 (App. Div. 1992), to support its call for this court to require that the Department adopt rules defining excessiveness. Yet, Genworth knows from its extensive involvement in the long-term care industry for multiple

decades that a significant component of rate setting lies in the hands of actuarial professionals, who are guided by industry standards such as the ASOPs. The ASOPs define the rules of the game. In comparison, cases such as Boller Beverages and Matter of Farmers' address facts that are quite the opposite from the ones before this court. Boller Beverages was a brand-name liquor distribution case where the Director of the Division of Alcoholic Beverage Control ruled that the labeling and sale of branded of corn whiskey in "Mason jars" was illegal in New Jersey, given that moonshine has been traditionally packed in Mason jars. 38 N.J. at 142. The court was focused on the intersection of state and federal law, which is not at issue here. In re Farmers' was concerned with whether the Commissioner of Insurance is required to conduct a hearing where an insurer applies for an exemption, abatement or deferral of its assessment under the Fair Automobile Insurance Reform Act of 1990 (the "Fair Act"), N.J.S.A. 17:33B-1 to -63. 256 N.J. Super. at 609. Observing that the Fair Act was not an "impeccable specimen of draftsmanship," this court addressed the complexities of whether the three statutory remedies called for agency rule making. Here, the complexities of rate increase filing have been addressed in the NAIC's model regulations, adopted here in New Jersey as N.J.A.C. 11:34-18, and the ASOPs.

Frankly, if Genworth lacked knowledge of the relevant standards, then on

what basis did its actuaries provide an opinion that the premium rate increase was not excessive? Does it also mean that Genworth's representations in its actuarial memoranda that the application was prepared consistent with ASOPs 8, 18 and 25 was false? Did Genworth ask for clarification from the Department about the applicable standards over the course of three separate rate increase filings (two of which were approved)? Did Genworth ever ask the Department for clarification of any unknown terms when it either met with or spoke with the Department during the rate review process? The answers to these questions are "no". Genworth knew of the applicable standards based on its prior 2016 and 2017 rate filings, as confirmed by its own expert witness (Schmitz) who acknowledged the applicability of the ASOPs.

Genworth points to Crema v. New Jersey Dep't of Env't Prot., 94 N.J. 286 (1983), and Dep't of Labor v. Titan Constr. Co., 102 N.J. 1 (1985), to argue in favor of established standards, limits and procedures to govern any agency's decision making and to contend that the lack of such rules was fatal to the agency's actions. (Ab25). Crema concerned the review of the DEP's "conceptual approval" of a large commercial and residential development in an environmentally sensitive area governed by the Coastal Area Facilities Review Act, N.J.S.A. 13:19-1 to -21. 94 N.J. at 290. The developer in Crema had applied to the DEP for a permit authorizing the development, but the DEP

granted a permit approving only the "concept" of development. 94 N.J. at 289. Crema is distinguishable from this case because here the Department is applying a standard identified by the Legislature in the LTCI Act, where the DEP in comparison was attempting to apply a new term/condition that did not reflect any such Legislative intent.

Titan is also distinguishable because that case concerned an aggressive and not previously contemplated standard adopted by the Commissioner of Labor to debar a corporate contractor and three of its corporate officers for violation of the Prevailing Wage Act. The core of the court's decision in Titan centered on how the Department of Labor construed its authority to identify "persons responsible" for failing to pay prevailing wages, given that the two governing statutes, N.J.S.A. 34:11-56.37 and 34:11-56.38, did not include the term "person responsible." 102 N.J. at 10.

Genworth fares no better by its reliance on Metromedia, Inc. v. Dir., Div. of Taxation, 97 N.J. 313 (1984). Metromedia concerned the determination by the Director of the Division of Taxation regarding the calculation of taxable revenue from Metromedia's sale of network air-time to national and local advertisers by applying a factor called "audience share," which the Director modified from its legislative basis contained in N.J.S.A. 54:10A-6. That statute set forth a formula for measuring a corporation's activities, based on three

factors (the "three-ply formula"), namely property, payroll and receipts. The problem was that the Director adopted the "audience share" factor as a modification of the receipts factor of the three-ply formula, without evidence of any Legislative intent to apply such a modified formula. 97 N.J. at 322-24. In the absence of any Legislative guidance, it was understandable for the court to rule that the Director used an ad hoc standard.

In Airwork Serv. Div. v. Dir., Div. of Taxation, 97 N.J. 290 (1984), decided the same day as Metromedia, the Court allowed to stand the Director of the Department of Taxation's assessment of sales tax under N.J.S.A. 54:32B-1 to -29. The taxpayer in Airwork was engaged in the repair of airplane engines and took the position that although its services were rendered in New Jersey, the engines were later returned to out-of-state customers, and therefore the services were not taxable in New Jersey. The Metromedia factors did not apply because the Division of Taxation's assessment is clear and inferable from the tax statute itself, especially in the absence of contrary language in the statute.

Here, the Department considered Genworth's desire to achieve approval of the maximum rate increase (with the non-customary 15% MAE) and non-actuarial factors RBO and FBO Genworth offered to mitigate its substantial rate increase. Unlike the facts in Metromedia, Crema, and Airwork, the Department applied well-known standards and did not engage in administrative rulemaking.

The Department's concerns were not hidden, and Genworth was treated fairly each step along the administrative review process. Contrary to Genworth's reliance on Application of Union Cmty. Bank, 144 N.J. Super. 39 (App. Div. 1976) in footnote 12 of its brief, the Department did not make a sharp departure or any departure from establish agency policies and practice. The Department's reasons are well articulated, supported by citations to the record, and adequately supported by the hearing testimony and documentary evidence. The Commissioner's decision is likewise based on the data submitted and explanations provided by Genworth in its responses to the Department's Objection Letters. The Objection Letters must be read in total, not isolation, to understand the reasons for the disapproval.

3. There is No Basis to Reverse the Commissioner's Decision.

Genworth tries to backpedal from its own actuarial certification, which memorialized its opinion that the requested rate increase was not excessive. Genworth calls this statement by a licensed professional, i.e., an actuary, a "passing statement of opinion" which should mean nothing in the mix of the analysis. (Ab38-39). The actuary's certification is required by the rules, and the standard for reviewing rates is set by the Legislature in the LTCI Act, which allows the Commissioner to disapprove rates that are excessive. Genworth cannot ignore the Legislature's intent for the Commissioner to weigh all

information supporting the rate filing.

Genworth turns its back on the substantial changes it made to its actuarial assumptions for the fourth consecutive time. It expects the Department and the Commissioner to blindly accept its assumptions, which were a major factor in calculating the rate requests. The Department took a balanced approach and wanted to see more actual experience develop (i.e., credibility under ASOP 25) before hitting policyholders with a triple digit rate increase in one year. For 2020, as the ALJ and the Commissioner found, disapproval of Genworth's did not preclude rate increase requests in the future.

Genworth can point fingers at the Department all it wants, but its rhetoric cannot dilute the core of the LTCI Act. Consideration of the impact to the public (i.e., the policyholders) should not be dismissed as some intellectual or academic consideration. Inasmuch as Genworth has the right to raise premiums, there must be the backstop to protect the policyholders. That is why the LTCI Act and rules give the policyholders an important voice in the analysis through the Department's painstaking task of reviewing premium rate increase requests. Genworth should not be so quick to dismiss the claimed "equitable gloss," when it has made tens of millions of dollars from premium payments by policyholders. The impact on its policyholders is not nebulous concept, as Genworth argues (See Ab43). Those concerns are real and the rules are structured to prevent

overreaching by carriers in seeking premium rate increases to strike the correct balance. [7]

Simply put, there is no basis in the record to reverse the Commissioner's decision. Genworth had fair notice of the standards. Regardless of Genworth's disagreement, because the Department, the ALJ, and the Commissioner relied on the documentary evidence, the facts and testimony, as well as the expert testimony in reviewing the premium rate increase request, appropriately read in context with the spirit and purpose of the LTCI Act, and reached a conclusion supported by substantial, credible evidence in this record, the disapproval of its rates should be affirmed.

CONCLUSION

For these reasons, the Departments' disapproval of Genworth's 2020 rate filings should be affirmed.

Respectfully submitted,

CARELLA, BYRNE, CECCHI,
OLSTEIN, BRODY & AGNELLO, P.C.

By: s/G. Glennon Troublefield
G. GLENNON TROUBLEFIELD (042321991)
GTroublefield@carellabyrne.com

Date: September 27, 2024

[7] The NAIC's Guidelines add that in using judgment, a major concern is "gaming," that is, complying with the letter of the law, but pushing the limits and definitions beyond common sense. The possibility of gaming should be avoided by insurers and actuaries." (Ra241).

GENWORTH LIFE INSURANCE COMPANY, Appellant, v. TRISH WALLACE, ACTING COMMISSIONER, NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE, Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-001231-23 CIVIL ACTION ON APPEAL FROM A FINAL DECISION OF THE NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE OAL Docket No. BKI-02284-2022

REPLY BRIEF OF APPELLANT GENWORTH LIFE INSURANCE COMPANY

BRESSLER, AMERY & ROSS
A Professional Corporation
325 Columbia Turnpike, Suite 301
Florham Park, New Jersey 07932
P.O. Box 1980
Morristown, New Jersey 07962
Telephone: (973) 514-1200
Facsimile: (973) 264-4096

SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
Telephone: (212) 839-5300
Facsimile: (212) 839-5599

SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
Telephone: (312) 853-7000
Facsimile: (312) 853-7036

BLANK ROME LLP
300 Carnegie Center
Suite 220
Princeton, NJ 08540
Telephone: (609) 750-7700
Facsimile: (609) 750-7701

Attorneys for Appellant
Genworth Life Insurance Company

On the Brief:
Cynthia J. Borrelli, Esq. (028711985)
Eamon P. Joyce, Esq. (*pro hac vice*)
Shirin Mahkamova, Esq. (*pro hac vice*)
Stephen M. Orlofsky, Esq. (012431974)

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I. THE COURT SHOULD REVERSE THE DEPARTMENT'S DISAPPROVAL OF GENWORTH'S APPLICATIONS.

Genworth's brief showed that reversal is required because the purported basis for denying the requested rates has shapeshifted and was illegal in any event. After the Department issued a disapproval letter that was unmoored from regulatory or statutory text and made no mention of "excessiveness," that decision transformed into something new in the ALJ's hands ("excessive *and* unreasonable"), then was re-written again by the Commissioner to rest on "excessiveness" alone. *See* Pb13–45. In sum, the Commissioner purported to affirm a determination that the agency had never made. Regardless, the Commissioner rested on a ground—independent excessiveness—that cannot be invoked absent the promulgation of an explanatory regulation.

The Department's brief confirms as much. It effectively concedes that the disapproval letter had a different basis from the mid-litigation "excessive" finding, *see, e.g.*, Db28–31; it illustrates, through myriad inconsistent definitions, that the term "excessive" is too broad to be enforced without the regulations that the legislature mandated, *see, e.g.*, Db13, 33–36, 41–44; and it fails to offer cases to support its positions on appeal (rather than unsuccessfully trying to distinguish Genworth's cited cases), *see* Db28–48. This Court should reverse and annul the unlawful determination.

A. The Department confirms that the ALJ and the Commissioner improperly rewrote the actual disapproval.

1. The Department tacitly concedes that its disapproval letters did not provide notice of an "excessiveness" issue invented in adjudication.

The Department says that its denial letter rejected Genworth's rates on excessiveness grounds, but it does not and cannot cite *any* page of the record to support this argument. In straining to contend that "excessiveness" was at issue all along, the Department chides Genworth for focusing on the last disapproval letter rather than the parties' many exchanges leading up to that denial. *See*, *e.g.*, Db1. But that focus changes nothing. It confirms Genworth's position, because *none* of the Department's over eight disapproval letters and other correspondence stated that Genworth's rate increase was "excessive." *See, e.g.*, Db4, 19–20 (discussing same without mentioning excessiveness). Rather, the Department tacitly agrees that it was the ALJ and the Commissioner who gave excessiveness as a *post hoc* basis for disapproval. *See, e.g.*, Db2, 5.

The Department seeks to minimize its after-the-fact rationalization by characterizing it as a "lack of formality" and "organiz[ation,]" and an issue of "form over substance." Db28, 29, 31. But, as Genworth showed, "[p]rohibiting *post hoc* rationalization for agency action is not merely a technical legal requirement." Pb18. It "is a matter of substance." *N.J. Bell Tel. Co. v. Commc'ns Workers of Am.*, 5 N.J. 354, 375 (1950). Elementary due process demands that a party "know the issues on which decision will turn and [] be apprised of the

factual material on which the agency relies for decision so that [it] may rebut it." Pb18–19 (citation omitted). Yet, as the Department concedes, it was the "*disapproval letters* . . . [that] put Genworth on notice of the Department's reasons for disapproval of the premium rate increase requests." Db29 (emphasis added). That is dispositive because those letters gave no notice that the Department deemed the rates "excessive." *See supra* p. 2; Pb19–20.

The Department tries to overcome this by claiming that the disapproval letters left a trail of hints Genworth should have deciphered and addressed. *See, e.g.*, Db19 (arguing the letters "made it quite clear that the magnitude of Genworth's premium rate increases had triggered alarms.").[1] This is audacious. The Department is effectively saying that because Genworth knew that its rate increases were being questioned *generally*, it cannot complain. That has no support in administrative law; the reason *why* an agency acts is critical, as the New Jersey Supreme Court has made clear. *See N.J. Bell Tel.*, 5 N.J. at 376 (rejecting notion that a "lack of express finding by an administrative agency may be supplied by implication"). There was no way of knowing that there was a subtext of "excessiveness" from the Department's letters discussing loss ratio

[1] Db25 (asserting "Genworth knew" the rate increase "raised red flags"); Db30 ("Genworth was well aware that the steep degree of its requested rate increases was at issue."); Db33 ("Genworth was on notice that the Department was questioning the level of its requested premium rate increases all along.").

and actuarial assumptions, Db30—subjects the Department, ALJ, and Commissioner have admitted are grounded in regulations and a different source of authority than the statutory term "excessive."

As Genworth showed, the Department had a duty to ensure "adequate notice, a chance to know opposing evidence, and the opportunity to present evidence and argument in response.'" Pb19 (citation omitted). "[U]nstated reasons" cannot justify agency decision *post hoc*. Pb16 (citing *Berta v. N.J. State Parole Bd.*, 473 N.J. Super. 284, 303–04 (App. Div. 2022)). Nothing about the disapproval letters met these requirements given the "excessiveness" ruling that popped out of the end of administrative review. Pb19–23. In fact, the only letter to which the Department points merely asked Genworth about "the 'acceptable maximum lifetime loss ratio,'" not excessiveness. Da663.[2] The Department cannot explain how this possibly gave notice that the real issue supposedly was whether "Genworth's premium rate increase request was excessive." Db30.

Instead, the Department focuses on *Genworth's response* to the question and on boilerplate in its actuarial memoranda. *See* Db30–31. But as shown, *see* Pb38–39, a regulated entity cannot be the source of a due process notice to *itself*.

2. The Department fails to cite relevant authority or distinguish ours.

Save one inapposite case, the Department's brief does not affirmatively

[2] The Department (Db30) mis-cites Da691, when, from context, it means Da663.

offer any cases to support its position—instead merely attempting to parry (unsuccessfully) Genworth's many authorities. *See* Db31 (citing *Application of Howard Sav. Inst. of Newark*, 32 N.J. 29, 53 (1960)). Based on *Howard Savings*, the Department argues that as long as "[the court] and the interested parties can and do understand fully the meaning of the decision and the reasons for it, no sufficient reason exists to remand for fuller and clearer findings and later reconsideration." Db31. But that principle has no role to play here and *Howard Savings* is markedly different from this case. There, competitors of a bank for which the Department approved a new branch office argued that in determining whether the public interest would be served by it, the Commissioner "failed to make basic findings of fact." 32 N.J. at 52. The court disagreed because "[t]here was really no [b]asic fact in" dispute, and thus, "no sufficient reason . . . to remand for fuller and clearer findings." *Id.* at 52–53. Here, Genworth asserts that the Department created an illegal *post hoc* basis for its action, denying Genworth notice of the *legal* basis of decision, which also prevented Genworth from knowing what the Department deems "excessive," *see infra* § I.B, or explaining why its requested rate increase is not. *Howard Savings* is irrelevant.

The Department also fails to engage with the relevant—and central—reasoning of the authorities that Genworth cited to demonstrate that *post hoc* agency action requires reversal. *N.J. Bell Telephone* rejected the agency's

suggestion that an agency's "lack of express finding" can later be "supplied by implication." 5 N.J. at 376; Pb16, 18. The court's reference to lack of "factual data" there, Db32, only supports Genworth's position that the Department's failure to make a specific finding of "excessiveness" here is fatal. *N.J. Bell Tel. Co.*, 5 N.J. at 379 (rejecting agency ruling that failed to articulate "facts necessary to support its conclusion *with reference to the wage increase*" at issue there (emphasis added)). Consistent with *In re Issuance of a Permit by Department of Environmental Protection to Ciba-Geigy Corporation*, the Court should refuse to consider this *post hoc* ground because the Department "did not rely on the [rationale]" in its disapproval letters. 120 N.J. 164, 176 (1990); Pb18. That the agency there "conceded that it did not apply the" criteria mandated by law, Db33, is beside the point because this record equally confirms that "excessiveness" was sprung mid-litigation.

The Department's sudden course reversal "foreclose[d]" any notice to Genworth. Pb19 (citing *Bowman Transp., Inc. v. Arkansas–Best Freight Sys.*, Inc., 419 U.S. 281, 288 n.4 (1974) and *Friedler v. Gen. Serv. Admin.*, 271 F. Supp. 3d 40, 57 (D.D.C. 2017) (Brown-Jackson, J.)). The Department cannot duck the problem by pointing to the agency's treatment of the evidence in *Bowman*, Db33–34, which did not pose an unfair notice issue because that agency "offered [an] *identical rationale* in . . . a case decided just as hearings in

the case began." 419 U.S. at 288 n.4 (emphasis added). Nor is it credible to claim that *Friedler* is different. Db34. Like the agency there, the Department "change[d] [] course" from its earlier position here. In the end, unable to identify anything in the disapproval letters or correspondence to support its new position on "excessiveness," the Department points to a passing comment by one of its witnesses before the ALJ. Db34 (citing hearing transcript). This merely confirms that, at best, excessiveness was dreamt-up mid-administrative review.

B. The Department shows that its *post hoc* "excessiveness" ruling was contrary to the legislative mandate and the regulatory process.

1. The Department's conflicting definitions of "excessive" prove that it seeks unbridled authority without the requisite rulemaking.

Consistent with Genworth's showings, Pb28–43, the Department concedes that neither its regulations nor any informal agency guidance sheds light on how the Department interprets and applies the statutory term "excessive," Db39–48; *see also* Db3, 33–36. The Department's claim that its loss ratio regulations "fulfilled [its] obligation to provide guidance to carriers about the rate review process" speaks volumes. Db39. *Those regulations*, of course, were the subject of the parties' lengthy exchanges that preceded the disapproval letter challenged in adjudication. But *those regulations*, as the Commissioner herself noted, do not purport to implement or even address the statutory excessiveness prong upon which the Commissioner ultimately relied. And true to form, the part of the Department's brief discussing that "guidance"

glaringly does not mention the term "excessive" or a regulation defining it. Db37–39. Nor does the Department cite a single case in which it has denied rates for "excessiveness" or given meaning to the statutory term.

Thus, the Department is left to argue that "[t]here was no need for [it] to define the term excessive." Db39 (relying on the "words chosen by the [l]egislature"). But the myriad (and often conflicting) definitions of excessiveness floated by the Department's brief prove the absolute necessity of formal regulatory definition. Indeed, none of the purported sources of definition advanced by the Department—"common sense," the Merriam-Webster dictionary, and ASOP 8—constitute a consistent and obvious meaning to the term such that rulemaking is *unnecessary*, the Legislature's touchstone. *See* Pb21–23, 41–43. Rather, those sources provide different and inconsistent definitions, and none square with how the Department has used "excessive" in its *post hoc* revisionism here (smuggled-in through previously unstated "public interest" considerations, *see* Pb42). We illustrate the many problems with those different flavors of definitions as follows:

First, the Department says that Genworth should know what the Department deems "excessive" to mean via "common sense" and "ordinary meaning," despite offering conflicting definitions within this category alone. *See, e.g.*, Db3 ("excessive" should be understood through the lens of a "*rational person*" weighing

whether the requested rate increase is "common sense"); Db36 ("The *impact* of the requested rate increases defied the common-sense and ordinary meaning of the word excessive"); *id.* ("Genworth's response that it *intended to use profits from this block to pay claims for other business* signaled that the rate request was excessive under the common-sense understanding of that adjective") (emphases added).

Second, the Department suggests that Genworth should look to ASOP's actuarial standards to understand what excessive means. *See*, *e.g.*, Db41.[3] So much for common sense and plain meaning. And never mind that Genworth looked to actuarial standards,[4] Pb11–12, and yet was still found to have proposed "excessive" rate increases. It remains that there are several issues with the Department's assertion that actuarial guidelines can replace rulemaking here. To begin, the Commissioner's final decision held that the "excessive" requirement is *non*-actuarial. *See*, *e.g.*, Pa21, Pa74 (Department "assess[ed] excessiveness" with "non-actuarial considerations"); Pa46 (relying on a *policy consideration* meant

[3] Db3 ("whether a rate is excessive is *based on actuarial standards* accepted in the industry that are 'spelled out pretty well' within [ASOP]"); Db21–22, Db41, 44 (discussing ASOP 8).

[4] The Department's series of questions regarding Genworth's actuarial memoranda, Db44–45, miss the mark for reasons Genworth explained and the Department does not address. *See* Pb38. The legislature mandated the *Department* to define what "excessive" means through rulemaking, and the Department failed to do so. ASOP 8, a non-binding industry guide, has nothing to do with the Department's obligations under the Act and due process.

to "protect[] the public."); Pa84 (similar); *see also* Db36 ("The rules only set the minimum loss ratio tests that carriers must meet; they *do not address* the outer limit of whether or not a rate is excessive" (emphasis added)). But the Department now about-faces to proffer definitions that *are* actuarial. *See* Db41 (relying on actuarial standards of ASOP 8 to define "excessive"). The ruling under review cannot simultaneously be non-actuarial and justifiable as supported by actuarial standards. One has got to give, and this illustrates the height of the arbitrary and capricious conduct at issue.

Besides, even if "ASOP 8 provides the operable guidance" here, Db41, the Department *never* said that it was denying Genworth's rate increases on that basis and there was no finding below that the rates contravened ASOP 8.[5]

Third, the Department argues "excessive" is a policy term, to be understood in reference solely to the rights of policyholders, which the Department seeks to give itself unilateral authority to police under undefined standards. *See, e.g.*, Db35 (equating "excessive" to the Department's "obligation to promote the Legislature's expressed *policy to safeguard the public welfare*." (emphasis added)); Db49 (focusing on "[c]onsideration of the impact to the

[5] Setting aside the question of whether ASOP 8 is the correct standard for judging excessiveness, it does not inexorably follow that Genworth's rates would be deemed excessive under that provision. The Department does not proffer any basis for suggesting as much, and offers no response to Genworth's showing that other states have approved far higher rates. *See* Da722–23.

public (i.e., the policyholders)" and claiming "there must be the backstop to protect the policyholders"). This is doubly wrong. It acts to the exclusion of other policy considerations enumerated in the Act, *e.g.*, "to facilitate flexibility and innovation in the development of long-term care insurance coverage." N.J.S.A. 17B:27E-1. Moreover, the Department has no answer to Genworth's showing that an amorphous (and plainly non-actuarial) consideration like "public interest" "empower[s] [the Department] to deploy breathtakingly broad statutory language to arbitrarily pick winners and losers." Pb3; *see* Pb26. Indeed, the Department cannot even feign a limit on its power because no such limit exists without regulations.

Fourth, the Department pivots again, newly defining "excessive" as equivalent to "unprecedented." *See, e.g.*, Db1, 15, 20, 29, 36; *compare* Pb 20–22, 42 (discussing Department's earlier invocation of "aggressive[ness]," not unprecedentedness). But these two terms do not mean the same thing,[6] and "unprecedented" is yet another undefined term—Genworth still does not know what metric the Department uses here (are rates "excessive" when they are "unprecedented" temporally, procedurally, geographically, or otherwise?).

Fifth, as discussed *supra* § I.A, the Department equates excessiveness to anything that "trigger[s] alarms" or "red flags." Again, how Genworth—or any

[6] For example, a very *low* rate could be unprecedented but not excessive.

other insurer—would know how to apply this boundless "standard" is unstated.

Finally, unable to settle on a definition, the Department insists that because other statutes include the term "excessive" there is no need to define it. Db40. But this raises more questions than it answers. For one thing, the Department ignores Genworth's showing that the State *has* issued regulations to define excessive (doing so differently from regime to regime). *See* Pb29–31 & n.11. It fails to explain why agencies, including the Department, have done so if the term is self-defining. For another, that the Department *also* failed to promulgate regulations to define "excessive" as used in the other statutes it cites indicates a potentially broader problem,[7] not the absence of one. Anyhow, the Department does not identify authority showing that an agency or any court has interpreted the statutory term "excessive" in any of the many ways in which the Department tries to employ it here, never mind where that occurred after the agency failed to mention the concept in lengthy rate-making proceedings.

In the end, the Department's brief repeatedly confirms, once again, that its definition of "excessive" is a black box defined only by the Department's own *ad hoc* say-so. Regulations are plainly "necessary" to define the term.

[7] Consistent with the Department's novel *post hoc* "excessive" ruling here, it cites to no agency decision based on the unadorned term in any of the other statutes it cites. Had the agency so ruled, the same problem that arose here could surface as to those other statutes.

2. The Department cannot distinguish controlling precedent.

In the face of controlling precedent requiring rulemaking here, the Department offers no case to the contrary and fails in trying to distinguish Genworth's cases. The Department's argument that *Boller Beverages, Inc. v. Davis*, 38 N.J. 138, 151–55 (1962), "was focused on the intersection of state and federal law," Db44, is misleading because Genworth relies on the part of the court's analysis addressing exactly the kind of *ad hoc* rationalization by a federal agency as here, Pb26. And the Department's adoption of loss ratio regulations, Db44 (citing *Matter of Farmers' Mut. Fire Assur. Ass'n of N.J.*, 256 N.J. Super. 607, 621 (App. Div. 1992)), again is inapposite. The Department admitted that "excessiveness" rests on considerations outside the regulations. *See*, *e.g.*, Pb12; Db31 n.6. Anyway, *Farmers'* is highly relevant here. Like there, this case involves subject matter especially important for "insurance companies and the consumer public," thus calling for statutory rulemaking. Pb26.

Nor can the Department meaningfully distinguish the other cases Genworth cited. *See* Db45–48. The Department merely makes the same incorrect point that the ALJ and the Commissioner tried: this case is distinguishable from cases requiring rulemaking because "the Department applied a standard from the . . . Act" itself. Pa51; *see* Pa83 (similar). But this takes us full circle and still "does not answer any relevant question," Pb40, because the Act does not define

the term despite that, as just shown, it is susceptible to myriad conflicting definitions that would give the Department boundless authority to make *ad hoc* decisions, *see supra* pp. 8–12. Fundamentally, each of these cases addressed a situation in which an agency erroneously acted without promulgating regulations, like here. Pb25–28, 31–37.

Brushing aside controlling precedent and the legislative mandate to promulgate regulations, the Department goes so far as to argue that adopting regulations would "destabilize the rate review process," because they would define "excessive" using "[h]ard and fast" rules and "percentages" and impose "mandatory rate caps." Db42. This is bizarre. The *Department* would promulgate regulations and thus readily can avoid anything it deems unwise.[8]

The Department's reference to the brief Genworth filed in New Hampshire is inapposite. *See* Db42–43. It concerned different statutory language and factual circumstances not relevant here. That statute "authorizes [New Hampshire's] commissioner to issue rules that govern rates, with the interests of insurers and policyholders in mind." Da934. The agency there adopted rules that set caps on premium increases and based them "on the attained age of the policyholder." Da934. Genworth argued this regulation was *ultra vires* because it did not

[8] *See* Db43 (criticizing other definitions of "excessive" as "unworkable" while ignoring that (i) regulations for *this statute* would not have to replicate them and (ii) the other regulations apply definitions bespoke to those contexts).

comport with the statutory mandate that increases "promote premium adequacy" *and* "prevent substantial rate increases rather than protect policyholders in the event of a substantial increase." Da934. If anything, that brief is *consistent* with *Genworth's* position here. Db42–43.[9] Here too Genworth is asking the Court to ensure that the Department complies with this Act's command that the "[t]he commissioner *shall* promulgate regulations . . . necessary to effectuate the purposes of this act." Pb26–27.

At bottom, the Department's about face and shifting definitions, without rules and regulations that define "excessive," confirm exactly the problem that Genworth identified. Like in *Boller Beverages*, 38 N.J. at 152 and *Metromedia, Inc. v. Dir., Div. of Taxation*, 97 N.J. 313, 329 (1984), the Department's interpretation of the statutory term allows it to do whatever it wants, making the term "excessive," at best, a moving target. This is contrary to established law that rulemaking is necessary here. Pb25–28.

CONCLUSION

For these reasons and those stated in its opening brief, Genworth respectfully requests that the Court reverse the Department's disapproval.

Dated: Florham Park, New Jersey
September 23, 2024

Respectfully submitted,

[9] To the extent the Department raised this to argue judicial estoppel, Genworth is free to take different positions in cases with different states, statutes, and facts.

/s/

Cynthia J. Borrelli
cborrelli@bressler.com
BRESSLER AMERY & ROSS, P.C.

Eamon P. Joyce (*pro hac vice*)
ejoyce@sidley.com
SIDLEY AUSTIN LLP

Shirin Mahkamova (*pro hac vice*)
shirin.mahkamova@sidley.com
SIDLEY AUSTIN LLP

Stephen M. Orlofsky
stephen.orlofsky@blankrome.com
BLANK ROME LLP