

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF COMMERCE

In the Matter of the Second Order  
Disapproving Rate Filings Issued to  
Genworth Life Insurance Company on  
behalf of MetLife Insurance Company of  
Connecticut

**SECOND PREHEARING ORDER**

A contested case hearing in this matter is scheduled to be held before Administrative Law Judge LauraSue Schlatter on November 17-19, 2014, pursuant to the First Prehearing Order dated April 24, 2014.

Christopher M. Kaisershot, Assistant Attorney General, represents the Minnesota Department of Commerce (Department). Deborah A. Ellingboe and Justin P. Krypel, Faegre Baker Daniels, LLP, represent Genworth Life Insurance Company on behalf of MetLife Insurance Company of Connecticut (Company).

On October 16, 2014, the Department filed a Request for Continuance in this matter. The Company filed a Memorandum Opposing the Department's Request for Continuance on October 20, 2014. The Administrative Law Judge heard arguments on the parties' positions in a telephone conference on October 21, 2014.

Based upon the submissions of counsel and the prehearing record, and for the reasons discussed in the attached Memorandum,

**IT IS HEREBY ORDERED:**

1. The Department's Request for Continuance is **DENIED**.
2. The date for service and filings of witness lists and exhibits is extended as follows:

By **4:30 p.m. on November 7, 2014**, the parties shall exchange and file with this Office their proposed pre-labeled exhibits, an index of the proposed exhibits, and their witness lists. See Minn. R. 1400.6950. The Company shall label its exhibits sequentially using numbers 1 through 199. The Department shall label their exhibits sequentially using numbers starting with 200. To the extent necessary, the parties may agree to a different numbering sequence to accommodate their exhibits.

The parties shall cooperate to avoid duplicating one another's exhibits. All pages of exhibits shall be Bates stamped for identification.

To the extent possible, the parties shall enter into prehearing stipulations regarding the facts involved in the hearing and the foundation for anticipated exhibits. Any party objecting to the foundation for any written exhibit shall notify the offering party and the judge in writing at least two (2) working days prior to the hearing or the foundation objection is considered waived.

3. A hearing in this matter will be held at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota 55101. The hearing is scheduled for **three** consecutive days, beginning on **November 17, 2014 at 9:30 a.m.** and continuing as needed on **November 18 and 19, 2014.**

4. All other relevant provisions in the First Prehearing Order remain in effect.

Dated: October 23, 2014

s/LauraSue Schlatter

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LAURASUE SCHLATTER  
Administrative Law Judge

## MEMORANDUM

### Department's Arguments

The Department requested what it characterized as a "brief continuance," for several reasons. First, the Department asserted that the parties were "substantially off-track from the [discovery] deadlines established at the prehearing conference on April 23, 2014." Specifically, the Department noted that, while the First Prehearing Order required all discovery to be complete by October 10, 2014, depositions were scheduled to occur on October 27, 30, and November 4.

Three of the deponents are Department witnesses (two fact witnesses and one expert) whose depositions the Petitioner noticed within the discovery period but whom the Department was not able to make available until late in October. The Petitioner agreed to the later deposition dates without objection but declined the Department's offer to push out the hearing dates.<sup>1</sup> The fourth deponent, Petitioner's expert witness, is scheduled to be deposed by the Department on November 4, 2014. The Department

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<sup>1</sup> Petitioner's Memorandum Opposing the Department's Request for Continuance (Petitioner's Memorandum), Affidavit (Aff.) of Deborah A. Ellingboe, Exhibit (Ex.) D.

implied that that deposition was scheduled so late because the Department must review approximately 23,000 pages of documents received from Respondent on October 14, 2014.<sup>2</sup> Those 23,000 pages were mailed to the Department in response to its discovery requests served on September 10, 2014. The Petitioner provided its responses on October 10, 2014 via e-mail and mail, including mailing a disk drive with the documents on October 10.<sup>3</sup>

The second reason the Department gave for requesting the continuance is a scheduling conflict with Deputy Commissioner Tim Vande Hey, whom the Department intends to call as a witness and who planned to serve as the official Department representative at the hearing. The hearing dates conflict with the fall conference dates of the National Association of Insurance Commissioners (NAIC) in Washington, D.C., which the Deputy Commissioner also planned to attend. The Department did not notice the scheduling conflict until sometime in early October 2014, and hoped the hearing could be rescheduled to resolve the conflict.

### **Petitioner's Arguments**

The Petitioner argued that the Department's reasons for requesting the continuance do not constitute good cause under Minn. R. 1400.7500. Furthermore, the Petitioner asserted that a continuance would be detrimental and unfair to it and should not be granted.

The Petitioner states that it attempted to schedule the Department's witnesses for depositions beginning in early September with the Department's expert, and in the third week of September with the Department's two fact witnesses. Due to circumstances that may have been beyond the control of the parties, the dates were pushed into late October, but the Petitioner did not object or wish to reschedule the hearing due to the late deposition dates.<sup>4</sup> It is not clear from the Department's pleadings whether there was any attempt to schedule the Petitioner's witness' deposition for an earlier date, but to the extent that the documents received on October 10 and 14 were the problem, the Petitioner followed the rules in responding to the discovery requests and should not be penalized for doing so.<sup>5</sup> Finally, the Petitioner pointed out that some of its own witnesses would ordinarily be attending the NAIC meetings in Washington, D.C., but that this proceeding is a priority for it and so the Petitioner chose to have these witnesses appear at the hearing rather than attend the NAIC conference.<sup>6</sup>

The Petitioner's asserted interest in maintaining the scheduled hearing date is based on several points. First, the Petitioner initially sought the disputed rate increase in March 2010 and alleges it is now at a disadvantage compared to certain of its peers who have obtained rate increases since then. In addition, the Petitioner and its

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<sup>2</sup> Department's Memorandum in Support of Request for Continuance at 3.

<sup>3</sup> Aff. of D. Ellingboe, Ex. B.

<sup>4</sup> *Id.*, Ex. D.

<sup>5</sup> *Id.*, Ex. B.

<sup>6</sup> Petitioner's Memorandum at 2.

attorneys have spent significant time and resources “gearing up” for the hearing, based on the original hearing dates. To delay the hearing other than minimally would cost the Petitioner the time it would take for its own staff, as well as its attorneys, to re-prepare for the hearing. The Petitioner is anxious for this matter to be concluded. Finally, the Petitioner has witnesses scheduled to testify on the appointed dates who otherwise would have attended the NAIC conference but for the hearing.

## **Analysis**

Minnesota Rules part 1400.7500 requires the Administrative Law Judge to grant a request for continuance “upon a showing of good cause” and to consider “the ability of the party requesting a continuance to effectively proceed without a continuance.” In addition, the rule applies a list of what shall be considered “good cause.” While the list may not be exclusive, it describes narrow conditions:

death or incapacitating illness of a party, representative, or attorney of a party; a court order requiring a continuance; lack of proper notice of the hearing; a substitution of the representative or attorney of a party if the substitution is shown to be required; a change in the parties or pleadings requiring postponement; and agreement for a continuance by all parties provided that it is shown that more time is clearly necessary to complete authorized discovery or other mandatory preparation for the case and the parties and the judge have agreed to a new hearing date, or, the parties are engaged in serious settlement negotiations or have agreed to a settlement of the case which has been or will likely be approved by the final decision maker.

The rule also specifies what good cause does not include:

intentional delay; unavailability of counsel or other representative due to engagement in another judicial or administrative proceeding unless all other members of the attorney's or representative's firm familiar with the case are similarly engaged, or if the notice of the other proceeding was received subsequent to the notice of the hearing for which the continuance is sought; unavailability of a witness if the witness' testimony can be taken by deposition; and failure of the attorney or representative to properly utilize the statutory notice period to prepare for the hearing.

In this instance, it is unclear why the Department waited so long to make its final discovery request. There is no claim, or evidence, that it was done for the purpose of delay. Nor has the Department claimed that the Petitioner's discovery responses were less than adequate at any point in the process. By waiting until 30 days before the close of discovery to serve its final set of interrogatories and requests for production of documents, the Department put itself in the position of dealing with a great deal of documentation in the final weeks before the hearing. While this is inconvenient for the Department, there was no evidence to show that it will be impossible for the Department

to proceed effectively. The delayed deposition schedule does not constitute good cause for continuing the hearing, particularly in the face of the strong objections of the Petitioner.

The scheduling conflict with Deputy Commissioner Vande Hey, while unfortunate, also does not constitute good cause to continue the hearing. The NAIC conference is not more significant than another judicial or administrative proceeding, which the rule specifically excludes from “good cause” consideration. There was no claim by the Department that only Deputy Commissioner Vande Hey could attend the NAIC conference or function as the Department’s representative at the hearing. The Deputy Commissioner is being deposed in late October, and his pretrial deposition may be preserved for the hearing if necessary. The Administrative Law Judge would also consider a request to have the Deputy Commissioner testify via telephone or interactive television, although no such request has been made.

The prehearing conference in this matter was held on April 23, 2014. The parties consulted their calendars and agreed on the hearing dates. The Administrative Law Judge admonished them to confirm the dates with their clients. The First Prehearing Order was issued on April 24, 2014, but could have easily been amended to change the hearing dates had a party made that request in the first month or two after the schedule in this matter was set. The NAIC conference was scheduled years before the dates for this hearing were set. The conflict on the Deputy Commissioner’s calendar does not constitute “good cause” to continue the hearing.

While the Administrative Law Judge denied the Department’s request during the telephone conference on October 21, 2014, she also offered the parties the opportunity to look at two sets of dates close in time to the original hearing date. The Petitioner’s counsel offered to take the dates back to her client, but after further consultation informed the Administrative Law Judge and the Department that neither set of dates was a suitable alternative for the Petitioner. Given the calendars of the parties and the Administrative Law Judge, any other options will mean a hearing in mid-to-late January 2015 at the soonest, a delay of two months. Two months is not a “brief continuance.”

The Administrative Law Judge finds that the Department failed to demonstrate good cause for its request for a continuance. Therefore, the Department’s request is denied.

**L. S.**