

STATE OF WASHINGTON

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Hearings Unit OIC
Patricia D. Petersen
Chief Hearing Officer



OFFICE OF
INSURANCE COMMISSIONER

MIKE KREIDLER
STATE INSURANCE COMMISSIONER

DECLARATION OF MAILING

I declare under penalty of perjury under the laws of the State of Washington that on the date listed below, I mailed or caused delivery of a true copy of this document to *parties below*
DATED this 13th day of December 2005 at Tumwater, Washington.

Signed: Wendy Galloway

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In the Matter of:)
) No. D05-16
FREDERICK WEATHERBEE,)
)
Licensee.) FINDINGS OF FACTS,
) CONCLUSIONS OF LAW
) AND FINAL ORDER ON HEARING

TO: Frederick E. Weatherbee
5815 South Rebecca Street
Spokane, Washington 99223

COPY TO: Mike Kreidler, Insurance Commissioner
Michael G. Watson, Chief Deputy Insurance Commissioner
John Hamje, Deputy Commissioner, Consumer Protection
Carol Sureau, Deputy Commissioner, Legal Affairs
Charles Brown, Senior Staff Attorney, Legal Affairs
Office of the Insurance Commissioner
PO Box 40255
Olympia, WA 98504-0255

Pursuant to RCW 34.04.090, 34.04.120, 48.04.010 and WAC 10-08-210, and after notice to all interested parties and persons, the above-entitled matter came on regularly for hearing before the Insurance Commissioner for the state of Washington on August 15 and 17, 2005 in Tumwater, Washington. All persons to be affected by the above-entitled matter were given the right to be present at such hearing during the giving of testimony, and had reasonable opportunity to inspect all documentary evidence. The Insurance Commissioner (OIC) was represented by Charles D. Brown, OIC Senior Staff Attorney. Frederick E. Weatherbee (Licensee) appeared pro se.

Pursuant to RCW 34.05.461(3), the parties are advised that they may seek reconsideration of this order by filing a request for reconsideration under RCW 34.05.470 with the undersigned within 10 days of the date of service (date of mailing) of this order. Further, the parties are advised that, pursuant to RCW 34.05.514 and 34.05.542, this order may be appealed to Superior



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Court by, within 30 days after date of service (date of mailing) of this order, 1) filing a petition in the Superior Court, at the petitioner's option, for (a) Thurston County or (b) the county of the petitioner's residence or principal place of business; and 2) delivery of a copy of the petition to the Office of the Insurance Commissioner; and 3) depositing copies of the petition upon all other parties of record and the Office of the Attorney General in the United States mail. If a party chooses to file a petition in the Superior Court, he or she may, but is not required to, first file a request for reconsideration. For further information or to obtain copies of the applicable statutes, the parties may contact the administrative assistant to the undersigned.

NATURE OF PROCEEDING

The purpose of the hearing was to take testimony and evidence and hear argument as to whether the OIC's Order Revoking License, No. D 05-16, entered by the OIC on February 2, 2005, and Amendment of Order Revoking License and Statement of Additional Grounds, entered by the OIC on May 2, 2005, should be confirmed, set aside or modified. Said Order Revoking License revoked the insurance agent's license of the Licensee based upon facts alleged therein. The Licensee, by letter dated February 16, 2005 and filed February 22, 2005, requested this hearing to contest this Order Revoking License.

FINDINGS OF FACTS

Having considered the evidence and arguments presented at the hearing, and the documents on file herein, the undersigned presiding officer designated to hear and determine this matter finds as follows:

1. The hearing was duly and properly convened and all substantive and procedural requirements under the laws of the state of Washington have been satisfied.
2. On February 2, 2005, the OIC entered an Order Revoking License, No. D05-16, revoking the insurance agent's license of the Licensee. On February 22, 2005, the Licensee filed his Demand for Hearing to contest the subject Order Revoking License, which was later properly amended by Amendment of Order Revoking License and Statement of Additional Grounds entered by the OIC on May 2, 2005. Accordingly, after prehearing conferences held March 9, 2005 and April 20, 2005, on April 20, 2005, the undersigned entered a Notice of Hearing scheduling the hearing in this matter to commence on June 21, 2005. Thereafter, by Order of Continuance entered June 1, 2005, the undersigned continued the hearing in this matter until August 15, 2005. The hearing was ultimately held on August 15 and 17, 2005, and the final filing herein was made on September 12, 2005.
3. The Licensee is an individual who current holds a resident insurance agent's license in the state of Washington for approximately 23 years. Said insurance agent's license authorizes him to

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solicit life, disability, property and casualty insurance. He has never held a securities license of any kind. The Licensee's wife has held a Washington insurance agent's license for some 20 years; she also held a securities license in the late 1980's but holds it no longer. [Testimony of Licensee.] The Licensee has no additional training in insurance except for continuing education courses, and has taken no classes in investing or other financially related courses. [Testimony of Licensee.] He holds a high school degree and took some junior college classes at some point in time.

4. Since 1986, the Licensee has worked primarily in the area of tax sheltered annuities, pensions and employee benefits. He has worked substantially with Issaquah School District employees, and also with the Adams Conservation District (a nonprofit entity) in investing their retirement funds in tax sheltered annuities and other investments. The accounts with which the Licensee worked were 501(c)(3) plans and 403(b) plans. [Testimony of Licensee.] Additionally, the Licensee advised these employees about their state teacher's retirement programs and about social security.

5. The Licensee has operated through an entity, which is currently incorporated, called "Pension Concepts." All of the stock in this corporation is owned by the Licensee and his wife. The Licensee works in the company full time and his wife works there part time.

6. Annemarie Annerl (Annerl) has been a teacher of French, Spanish and German for many years in California, Hawaii and Washington, and currently teaches French and bilingual health in Spanish in California. She was head of the foreign languages department of a school in the Issaquah School District. She is an immigrant and is now 61 years old. She has no education in investing, accounting or related financial areas. She does not own any stocks or bonds. She rates herself as an investor as "as unsophisticated as they come." [Testimony of Annerl.] At the pertinent time, Annerl had known the Licensee for some 20 years and considered him her investment advisor. At all times the Licensee represented himself to be an investment advisor; at no time did the Licensee advise or notify Annerl either orally or in writing that he was an insurance agent. [Testimony of Annerl.] Indeed, he works through his corporation entitled "Pension Concepts" [business cards and stationary, Exs. 5, 3, 7] and also uses a business card identifying himself as *Financial Educational Systems, Inc., Rocky Weatherbee, Regional Director*. [Ex. 11.]

7. On or about 1998, Annerl contacted the Licensee, as her continuing investment advisor, to ask how she could continue to invest in her Northern Life tax sheltered annuities which he had previously sold to her, even though she was not in Hawaii. She advised the Licensee that her overriding concern was safety and that she was not interested in anything risky at all. She advised that she was satisfied with the gains she accrued with her current tax sheltered annuities and that she was not interested in stocks. The Licensee advised, however, that he had something better than where her retirement funds were currently invested and, in July and August, 1999, acting as Ms. Annerl's investment advisor, persuaded her to surrender the two Northern Life tax sheltered annuities which he had previously sold to her, in the amounts of \$52,300 and \$9,180,

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together with the funds in her IRA totalling approximately \$12,000 and some other funds. These amounts, which totalled \$102,900, were all that Annerl had in her retirement savings accounts. [Testimony of Annerl.]

8. Pursuant to the encouragement and advice of the Licensee, Annerl surrendered the annuities and IRA, and used other funds, to purchase a passive investment interest in Western Capital Partners III. [Testimony of Annerl; Testimony of Licensee.] Unknown to her, the Licensee received 25% commission on the sale.

9. The Licensee completed the bulk of the paper work to facilitate Annerl's investment in Western Capital Partners III. The Licensee wrote a letter dated June 25, 1999 to Northern Life Insurance Company, Inc. requesting that company to liquidate and transfer her two tax sheltered annuities and one IRA policy, for the purchase of the investment in Western Capital Partners III. This letter [Ex. 10] bears a signature which was not Annerl's. Annerl never received a copy of this letter in the mail, did not sign it and did not return it. It is not Annerl's handwriting. [Testimony of Annerl.] Even her name is misspelled on that letter. Further, in attempting to show that Annerl qualified financially to make this type of investment, the Licensee grossly overstated her and her husband's income and represented that they owned a house worth \$550,000 as of 1999 when they had actually sold their house in 1996 and did not own a home at all. [Ex. 9, pgs. 6 and 7; Testimony of Annerl.]

10. As part of his efforts to induce Annerl to surrender the safety of her retirement annuities and other conservative investments, to use those funds to purchase their investments in the Western Capital Partners III start up, the Licensee made many material misrepresentations. For example, he advised Annerl in writing that *Your return averages 16% the first 5 years and in the mid-30% range the last 5 years. At the end of 10 years you get your principle (sic) back or you can re-invest. This is a Partnership where the risk is very low ... All these transactions are insured, so if the accounts receivables are not paid, the insurance company pays them ... This is a very secure program. ...* Further, in a subsequent letter to Annerl dated June 15, 1999 [Ex. 7], the Licensee further advised: *...keep in mind the program is a ten year program, averaging a minimum return of 16% the first 5 years and in the mid-30% range the last 5 years. At the end of ten years the partnership is dissolved and all principle (sic) is returned (340 to 400% ten year total return). ... All factoring contracts are insured, thereby guaranteed, through the American Credit Indemnity company.... ...there is no stock market risk....There is not a down side to this market....*

11. In fact, an investment in the Western Capital Partners III start up partnership was very insecure, never produced any interest close to that quoted, was not insured and Annerl will never receive any of her investment back. Indeed, by the fall of 2003, the co-managing partner of Western Capital himself, Kent Cunningham, finally acknowledged to the investors and institutions holding their accounts that the account value of their partnership interests was zero [Ex. 12.] and on September 29, 2003 she was advised again, by John Beater, its Vice President, that the value of her investment was zero. [Ex. 13.] Further, Mr. Cunningham again advised the Insurance Commissioner in his June 8, 2004 letter [Ex. 6] that there was no longer any value to

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her account and that the partnership investment which she purchased was not insured and that the partnership *carried a high degree of risk*. [Ex. 6.] Western Capital Partners III is now defunct, and Annerl has lost all of her investment. Because this \$102,900 amount was Annerl's total retirement savings, Annerl has now lost all of her retirement savings.

12. Donald C. Sams is an individual who is a resident of Washington. The Licensee apparently met Mr. and Mrs. Sams through Mr. Sams' employment with the Issaquah School District. The Licensee and his wife had provided Mr. and Mrs. Sams with retirement investment advice and services since the early 1980's.

13. In October and November, 1999, the Licensee contacted Mr. and Mrs. Sams and induced them to liquidate two of Mr. Sams' annuities which he maintained for retirement, which totalled approximately \$80,000 and constituted a substantial portion of his retirement savings. [Testimony of Mrs. Sams.] The Licensee had originally sold these annuities to Sams and Sams and his wife were satisfied with them. The Licensee induced Mr. and Mrs. Sams to liquidate them, however, to purchase an investment in Western Capital Partners III, assuring the Sams that this was a safe investment that would provide better returns than Mr. Sams' annuities. [Testimony of Mrs. Sams.]

14. As found above regarding Annerl, an investment in the Western Capital start up was a very insecure and risky investment. Further, as also found above relative to Annerl, neither the Licensee nor his company were, or have ever been, licensed to sell securities such as this one, and the Licensee made material misrepresentations to induce Sams to purchase the investment in Western Capital. Finally, unknown to Sams, the Licensee also received an immediate 25% commission on the sale of this investment to Sams.

15. Gary DeVore (DeVore) is an individual who is a resident of Washington. DeVore is an employee of the Adams Conservation District and, during the pertinent time, was within 2 years of retirement.

16. On or about January 2000, acting as DeVore's investment advisor under the name of Pension Concepts [Ex. 16] and not representing himself as an insurance agent, the Licensee induced DeVore to surrender approximately \$107,000 of his retirement savings to purchase an investment of Western Capital Partners III. The Licensee advised DeVore that *The investment returns are insured and guaranteed by the American Credit Indemnity Insurance Company (a 100 year old A+ rated company, owned by Dunn & Bradstreet)*. [Ex. 16.]

17. As found above regarding Annerl and Sams, an investment in the Western Capital Partners III start up was a very insecure and risky investment. Further, as also found above relative to Annerl, neither the Licensee nor his company were, or have ever been, licensed to sell securities such as this one, and the Licensee made material misrepresentations to induce DeVore to purchase the investment in Western Capital Partners III. Finally, unknown to DeVore, the Licensee also received an immediate 25% commission on the sale of this investment to DeVore.

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18. The representations made to Annerl, to the effect that he was an investment advisor, together with his failure to disclose at any time the fact that he was an insurance agent, constitute material misrepresentations in the conduct of the Licensee's. Further, the above representations made to Annerl, Sams and DeVore regarding the expected return rate, security and insured status of the Western Capital investments, which were clearly untrue, were material misrepresentations in the conduct of his business. Further, the fact that neither the Licensee or his company were, or ever have been, licensed to sell securities in Washington as required by the state of Washington Department of Financial Institutions (or elsewhere) demonstrates that he is incompetent, and untrustworthy and a source of injury and loss to the public and not qualified to act as an insurance agent in the state of Washington.

19. The amounts of investments in Western Capital Partners III which the Licensee sold were very substantial. The Licensee had previously sold investments in Western Capital Partners I and II, but these were closed because they were only allowed to secure investments of to a maximum of some \$2,000,000 in each and so apparently were closed because all of those interests were sold. [Ex. 8; Testimony of Licensee.] As to the Licensee's commissions received just on the sale of interests in Western Capital Partners III, he sold over \$260,000 and so earned commissions of 25%. [Testimony of Licensee.] The Licensee sold over \$500,000 in Western Capital Partners II [Testimony of Licensee] at a similar rate of commission.

20. The Licensee also attempted to induce Annerl, Sams and DeVore to also purchase an investment in Alpha Telcom. Alpha Telcom, which is also now defunct (below) was in the business of selling investments in pay telephones to investors. These telephones were to be operated by Alpha Telcom and Alpha Telcom was to remit \$54.38 per month per telephone to the investor and return the investors' principal in three years, allowing the investor to take a depreciation allowance on his federal income tax return.

21. In inducing DeVore to actually purchase an investment in Alpha Telcom, the Licensee advised DeVore *The Alpha Telcom company (sic) has been selling and maintaining these pay-phones for over 14 years. The minimum investment is \$5,000 and the purchases are in \$5,000 increments. There is a 50% Tax-Credit, up to \$10,000 (\$5,000 Tax-Credit), and what is known as a 5 year Straight line Depreciation on the amounts invested above \$10,000. The investment pays 14 to 16% annual return paying each month....*

22. On the advice and encouragement of the Licensee, DeVore invested \$10,000 in Alpha Telcom. Subsequent correspondence from the Licensee confirms that the promised tax write offs were denied by the IRS. Alpha Telcom was placed into receivership by the Securities and Exchange Commission (Civil Action No. CV 01 1283PA). Further, Alpha Telcom filed for bankruptcy in the U.S. Bankruptcy Court in Florida. The U.S. District Court concluded that the Alpha Telcom promoters were unlawfully selling unregistered securities (350 F.3d 1084, 9th Cir. 2003), and DeVore has lost all of the funds he invested in Alpha Telcom.

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23. The Licensee received a Statement of Charges from the Washington Department of Financial Institutions (DFI) [Ex. 20] reaching the conclusion that the Alpha Telcom promoters were unlawfully selling unregistered securities and took action against him for violation of the Securities Act of Washington, finding, among other factors, that he had failed to provide material information regarding Alpha Telcom during the investment offering, the risk of the investment, the financial condition of Alpha Telcom and the basis for the representations made to investors of a 14% annual investment return., and that the Licensee violated state securities laws by offering the securities without being registered as a broker-dealer or securities salesperson in Washington. The Licensee subsequently agreed to a Consent Order [Ex. 23] ordering him to cease and desist from offering and selling securities in violation of the anti-fraud provisions, the securities registration section and the securities salesperson registration section of the Washington Securities Act.

24. By Summary Order to Cease and Desist and Notice of Intent to Impose Fine, No. SDO-034-02, entered April 25, 2002, the Licensee was named as a Respondent in a matter involving Enerphaze Corporation. In that action, the Washington DFI found that the Licensee illegally sold and offered for sale in Washington Enerphaze stock and stock warrants in violation of the securities registration requirements of state securities law, the securities salesperson or broker-dealer requirements of that law, and the anti-fraud provisions of that law as well. [Ex. 21.] More specifically, the Washington DFI found that the Licensee, holding himself out as Vice President of Investor Relations for Enerphaze, during 2001 and 2002 along with other respondents sold more than \$3.7 million of Enerphaze stock and stock warrants to more than 5600 investors. The Washington DFI further found that sales tactics included representing that the company had a number of patents, when it actually had none, assuring investors that the stock could be sold at a price in excess of its original purchase price, and distributing a misleading business plan that projected millions of dollars in sales without identifying any reasonable basis for the projections. The Licensee received 10% commission on that portion of the \$3,500,000 in investments in Enerphaze which he sold. The Licensee admitted [Testimony of Licensee] to receiving \$200,000 (at least) in cash himself representing commissions on his sales of Enerphaze investments in 9 months alone.

25. As above regarding Western Capital Partners III and Alpha Telcom, the Licensee was not, and has never been, a securities salesperson or broker-dealer in Washington as required (or apparently elsewhere). Further, the Licensee sold Enerphaze stock to the public even after he has been served with the Washington DFI's aforementioned Statement of Charges and Notice of Intention to Enter Order to Cease and Desist in the Alpha Telcom matter and even though he was also subject to another Washington DFI cease and desist order in a viatical settlement security scheme that had been entered into December 13, 2001 (below). The Licensee subsequently agreed to entry of a Washington DFI Consent Order which again ordered the Licensee to cease selling securities in violation of Washington's Securities Act. [Ex. 19.]

26. By Summary Order to Cease and Desist No. SDO-107-01 entered December 13, 2001 and subsequent Consent Order and Order Vacating SDO-107-01 as to Frederick Weatherbee, entered

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June 17, 2002, and Consent Order as to Beneficial Services Corporation f/k/a IMTEK Corporation d/b/a Beneficial Assistance, the Washington DFI found that the Licensee illegally sold and offered for sale in Washington viatical settlements in violation of the securities registration requirements of state law, the securities salesperson and broker-dealer requirements thereof and the anti-fraud provisions of that law. [Ex. 18.]

27. By his conduct in selling and offering for sale in Washington investments in viatical settlement contracts and Enerphaze stock and stock warrants, as well as his conduct in selling and offering for sale investment contracts in Western Capital Partners III and Alpha Telcom, Inc., as found by the Washington State DFI the Licensee repeatedly violated the securities registration requirements of Washington state law, the securities salesperson registration requirements of Washington state law and the securities anti-fraud requirements of Washington state law. In so doing, the Licensee has demonstrated that he is incompetent, or untrustworthy, and a source of injury and loss to the public.

28. Based upon the above Findings of Facts, the Licensee has shown himself to be, and is here so deemed to be, untrustworthy and a source of injury and loss to the public and not qualified to be an insurance agent in the State of Washington.

29. Frederick E. Weatherbee appeared as a witness called by the OIC. Mr. Weatherbee is very erudite and sophisticated in appearance, and very intelligent. However, his testimony was incredible in many areas. As an example, he simply feigns lack of memory for some major parts of the events above, and then, later on, will testify to the same situation in some detail as if he remembers perfectly. Remarkably also, he recognizes no fault on his part for the plight of his victims and admits to no violations of laws or regulations at all. He also exhibits no true remorse for the harm that he has caused.

30. Annemarie Annerl appeared as a witness for the OIC. Ms. Annerl presented her testimony in clear and detailed manner. Her recollection was clear and her presentation was most credible. Further, she exhibited no apparent biases.

31. Janet So, of the Washington State Department of Financial Institutions, appeared as a witness on behalf of the OIC. Ms. So presented her testimony in a clear and credible manner and exhibited no apparent biases.

32. Gary DeVore appeared as a witness by telephone on behalf of the OIC. Mr. DeVore presented his testimony in a clear and credible manner and exhibited no apparent biases. Further, Mr. DeVore's testimony was consistent with his Declaration filed herein. [Ex. 29.]

33. Mrs. Donald Sams appeared as a witness by telephone on behalf of the OIC. Mrs. Sams, who testified that she, with her husband Donald L. Sams, was involved as to all of the events about which she testified. Mrs. Sams presented her testimony in a clear and credible manner and exhibited no apparent biases.

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34. Tom Talarico, an investigator with the OIC, appeared as a witness on behalf of the OIC. Mr. Talarico presented his testimony in a clear, detailed and credible manner and exhibited no apparent biases.

35. Frederick E. Weatherbee, the Licensee, appeared as the sole witness on his behalf. As above, Mr. Weatherbee is very erudite and sophisticated in appearance, and very intelligent. However, his testimony was incredible in many areas. As an example, he simply feigns lack of memory for some major parts of the events above, and then, later on, will testify to the same situation in some detail as if he remembers perfectly. Remarkably also, he recognizes no fault on his part for the plight of his victims and admits to no violations of laws or regulations at all. He also exhibits no true remorse for the harm that he has caused.

36. Based upon the activities of the Licensee as set forth in the facts found herein, it is here found that the Insurance Commissioner's Order Revoking License, No. D05-16, properly entered February 2, 2005, as amended by Amendment of Order Revoking License and Statement of Additional Grounds properly entered May 2, 2005, is reasonable under the circumstances and should be upheld.

37. The undersigned recognizes recent case law which draws into question the proper standard of proof to be applied in administrative cases involving some types of professional licenses, and recognizes that such cases involving insurance agents' licenses have not been addressed. In recognition of the question that this recent case law raises, however, the undersigned has applied both the "clear cogent and convincing" standard of proof and the "preponderance of the evidence" standard of proof, and finds the above facts under application of either the lower or the higher standard of proof.

CONCLUSIONS OF LAW

1. Pursuant to the Findings of Facts above relative to his activities concerning the Annerl, Sams and DeVore matters, the Licensee, Frederick E. Weatherbee, has demonstrated that he is incompetent, and untrustworthy, and a source of injury and loss to the public and not qualified to act as an insurance agent in the state of Washington, as contemplated by RCW 48.17.530(1)(h).

2. Pursuant to the Findings of Facts above relative to his activities concerning the Alpha Telcom, Enerphaze and IMTEK matters, the Licensee, Frederick E. Weatherbee, has demonstrated that he is incompetent, and untrustworthy, and a source of injury and loss to the public and not qualified to act as an insurance agent in the state of Washington, as contemplated by RCW 48.17.520(1)(h).

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3. Based upon the Findings of Facts herein, and Conclusions of Law directly above, it is hereby concluded that the Insurance Commissioner's Order Revoking License, No. D05-16, entered against Frederick E. Weatherbee on February 2, 2005 and amended by Amendment of Order Revoking License and Statement of Additional Grounds entered May 2, 2005, should be upheld.

ORDER

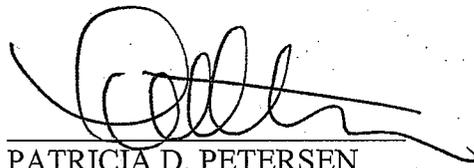
On the basis of the foregoing Findings of Facts and Conclusions of Law, to the effect that the Licensee has clearly demonstrated that he is incompetent, and untrustworthy, and a source of injury and loss to the public and therefore not qualified to act as an insurance agent in the state of Washington, as contemplated by RCW 48.17.530(1)(h),

IT IS HEREBY ORDERED that the OIC's Order Revoking License, No. D05-16 entered February 2, 2005 and as amended by Amendment of Order Revoking License and Statement of Additional Grounds entered May 2, 2005, is upheld.

IT IS FURTHER ORDERED that the Licensee's insurance agent's license shall be surrendered to the Office of the Insurance Commissioner, P.O. Box 40255, Olympia, Washington 98504-0255 by close of business on December 27, 2005.

This Order is entered pursuant to RCW 34.05, WAC 10-08-210 and RCW 48.04.010.

This Order is entered at Tumwater, Washington, this 12th day of December, 2005.



PATRICIA D. PETERSEN
PRESIDING OFFICER