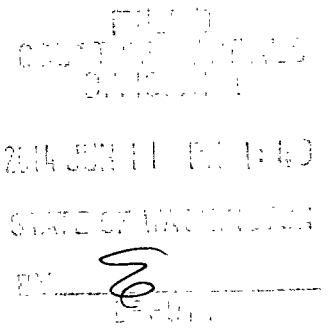

Case No. 45687-7-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

AMALGAMATED TRANSIT UNION, LOCAL 1384,

Appellant

v.

KITSAP TRANSIT and the
PUBLIC EMPLOYMENT RELATIONS COMMISSION,

Respondents.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

As the Public Employment Relations Commission ("PERC") has previously held, an employer who unilaterally changes a mandatory subject of bargaining should not be "*allowed to profit from its illegal acts.*" Despite its hopeless efforts to recast its deliberate and unlawful behavior as a series of events outside its control, the reality is that Kitsap Transit's unlawful actions resulted in the loss of the Premera health plan for members of the Amalgamated Transit Union, Local 1384 ("ATU"). As a result, Kitsap Transit was able to retain over a million dollars per year that it had previously been paying to provide the Premera plan – effectively profiting from its unlawful act.

The result of the Commission's decision modifying the Hearing Examiner's Order, which would have required Kitsap Transit to remit this savings stemming from its unilateral change, was an error of law and arbitrary based on the failure to carry out PERC's statutory remedial responsibilities to issue "appropriate remedial orders." To make employees truly whole for the loss, any award must include the value ascribed to the superior Premera health plan. Additionally, there was no justification for the Commission to deviate from its standard remedy of requiring a restoration to the status quo, which itself is an extraordinary remedy, particularly in light of the evidence showing at least one alternative option existed. The additional evidence submitted by ATU, relating to the Commissions' finding of "impossibility" should have been admitted into the record under the Administrative Procedures Act (APA).

II. ARGUMENT

A. Kitsap Transit Willfully Disregarded its Good Faith Bargaining Obligations and Asserted a Frivolous Defense that Necessitates the Imposition of Significant Remedy

There is an old adage, often attributed to Winston Churchill during World War II, stating: "history is written by the victors." In its briefing however, the respondent, Kitsap Transit, has done its best to turn this notion completely on its head and leave this Court with the impression that it has effectively done nothing wrong in this case. In turn, believing its actions were neither "egregious" nor its asserted defense "frivolous," Kitsap Transit urges this Court not to "second-guess"[1] the Commission's statutorily deficient remedy that fails to carry out PERC's mandated charge to issue "appropriate remedial orders."[2] Kitsap Transit's efforts in revisionist history, and its unwarranted liberal reading of PERC's statutory remedial obligations, should be rejected.

Contrary to the position presented in its briefing, the Hearing Examiner in this matter, which decision was affirmed by the full Commission, issued a *scathing rebuke* of Kitsap Transit for committing multiple unfair labor practices and asserting a defense to its behavior that while not found to cross the threshold of "frivolous," came exceedingly close to that line. Despite finding that Kitsap Transit's actions were a vain and callous effort to simply "save money" despite having an "obligation

[1] Resp. Br. at 2.
[2] *See* RCW 41.56.160.

to negotiate over changes in mandatory subjects of bargaining;"[3] Kitsap Transit now recasts the entire episode as the result of its "lawful efforts" to find alternative plans with the Premera PPO plan being eliminated only as the result of actions by "third parties outside of its control."[4]

In fact, the employer's efforts here were anything but lawful, with PERC, both at the Hearing Examiner and full Commission level, finding that several statutory violations occurred through Kitsap Transit's deliberate refusal to bargain. Likewise, the Hearing Examiner saw through the employer's flimsy efforts to blame the loss of the Premera plan on the actions of third parties; recognizing, instead, that the clear and incontrovertible evidence demonstrated that Kitsap Transit acted in a callous and deliberate fashion that forced Premera to withdraw its PPO plan and leave ATU's members without a valuable benefit.

A summary of some of the key findings by the Examiner, which have now been upheld on appeal and are not contested herein, verify the fact that Kitsap Transit displayed a wanton disregard of the rights of ATU and its members in this particular matter. For this reason, a remedy of significant import is vital to appropriately remedy the ill effects of this unlawful behavior and ensure the purpose of the statute is effectuated moving forward so that unlawful behavior, like that of Kitsap Transit, is not excused or repeated.

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[3] CR: 1893.
[4] Resp. Br. at 26, 29.

Recounting the timeline of events, the Examiner noted that around March of 2010, Cartwright (the Human Resources Director) "began working with John Wallen (Wallen), Insurance Broker, to find a less expensive alternative to the employer's existing health benefit plans." This was part of a "long-term strategy" on Cartwright's behalf "to have all health benefits provided by a single source..." and save literally millions of dollars. By mid-September 2010, however, Wallen informed Cartwright that it could not secure any alternative plans "within the cost parameters provided by the employer." Shortly thereafter, Cartwright informed Wallen that they would soon commence negotiations with the Machinists and Teamsters unions, which discussions would include moving off Premera.[5]

On September 27, 2010, Wallen told Cartwright that securing the Premera plan with just the remaining ATU members would be exceedingly difficult, warning Cartwright that "potentially, we may not be able to get a quote at all."[6] Just two days later, on September 29th, Wallen's fear was confirmed, when he informed Cartwright that Premera's underwriters would not agree to insure only the remaining ATU members. Cartwright responded to Wallen the same day, with the following observation:

> Don't kill yourself... we may just move the ATU folks to whatever other plan we come up with, *pay the difference*

[5] CR: 1877-78.
[6] CR: 1878.

> *out of pocket to make them whole* and negotiate from there.[7]

Ironically, Cartwright's assertion to Wallen in this email mirrors almost exactly the make whole remedy ordered by the Hearing Examiner, set aside by the Commission, and is the core issue on appeal herein.

Despite his clear knowledge that Premera would not cover the remaining ATU group and knowing that no other alternative plans existed at the time, Cartwright decided to move forward in bargaining, in late October 2010, with the Machinist and Teamster unions and "offer" them incentives to move off Premera and to another plan. "Sometime in late October or early November, 2010, the bargaining units represented by the Machinists and Teamsters unions reached a tentative agreement with the employer" that included moving them to the Machinists health plan in place of the Premera PPO plan. It was not until an email on November 5, 2010, from Cartwright to ATU's representative that ATU was given "first notice" of the loss of the Premera PPO plan, which change would take effect on January 1st, less than two months away.[8]

Given this sequence of events, the Hearing Examiner made the following finding:

> The employer took actions that made providing a PPO plan less and less desirable to insurance underwriters by decreasing the insurable employee pool of employees, offering multiple plan options, and incentivizing employees to choose the cheaper plan. The employer undertook these actions in order to save money on health insurance expenditures. Carwright knew that these actions could

[7] CR: 1878.
[8] CR: 1879.

> cause the employer to be in a position where it could not obtain a comparable PPO plan that would fall within the cost parameters it had given its benefits consultant. The employer ultimately made an economic decision to reduce its health plan expenditures without bargaining.[9]

Responding to Kitsap Transit's principal defense to its unlawful actions -- that it had a "business necessity"—the Examiner concluded as follows:

> An employer cannot take actions to directly cause itself to be disqualified from being able to maintain status quo benefits (in this case the more expensive PPO health plan) and then claim business necessity as a way to avoid its bargaining obligations.... In this case the employer unilaterally offered economic incentives and changed the premium structure to disqualify itself from being able to offer the Premera PPO...[10]

Notwithstanding the employer's attempt at revisionist history, what this recounting of the Hearing Examiner's decision makes clear is that there is no evidence to support Kitsap Transit's assertions that their behavior in this matter was at all times lawful and the loss of the plan was the result of decisions by third parties outside of their control. In fact, what led to the loss of the Premera plan was the result of calculated, deliberative, and well-informed decisions by Kitsap Transit to take a number of different steps to force Premera to withdraw its plan. The callous nature of its behavior leading up to the unfair labor practice, and the subsequently borderline frivolity of its business necessity defense in response to the charges by ATU, lead to the conclusion that the only "appropriate" remedy that can be issued to carry out PERC's statutory

[9] CR: 1888.
[10] CR: 1891.

charge is one that mandates the employer to restore the *status quo ante* and make ATU's members whole for the loss of this valuable benefit.

Based on its statutory charge under RCW 41.56.160, the courts have imposed on PERC the obligation to remedy the commission of unfair labor practices through the issuance of "appropriate orders." Consistent with this mandate, "appropriate remedial orders" have been found to be "those necessary to effectuate the purposes of the statute and to make the Commission's lawful orders effective."[11]

Included within the list of "appropriate remedial orders" are what PERC has now come to label as "extraordinary remedies," and includes such things as the imposition of "attorney fees, and interest arbitration." These "extraordinary remedies" have been deemed appropriate by PERC in situations where "a defense is frivolous, or when the respondent has engaged in a pattern of conduct showing a patent disregard of its good faith bargaining obligation."[12] A frivolous or meritless defense has been found to mean one that is "groundless or without foundation."[13] Orders from the Commission granting attorney fees, one of the "extraordinary remedies" have been awarded in situations where there is a "repetitive

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[11] *Municipality of Metro. Seattle v. Public Employment Rel. Com.,* 118 Wn.2d 621, 633, 826 P.2d 158 (1992).
[12] *University of Washington*, Decision 11499-A (PSRA, 2013); *citing State – Department of Corrections*, Decision 11060-A; *Seattle School District*, Decision 5542-C (PECB, 1997).
[13] *City of Anacortes*, Decision 6863-B (PECB, 2001).

pattern of illegal conduct or on egregious or willful bad acts by the respondent."[14]

ATU's position is that the original remedies imposed by the Hearing Examiner – to reinstate the status quo and make employees whole by paying them the difference in premiums between Premera and Group Health – were part of the standard basket of remedies that PERC is minimally required to impose, under RCW 41.56.160, in this case. Nevertheless, given Kitsap Transit's behavior in this case, as summarized above, the standards utilized by PERC for the imposition of extraordinary remedies could be satisfied as well. Given that fact, for the Commission to not even impose all of the standard remedies, when it would have been justified to impose an extraordinary set of remedies, is a significant miscarriage of justice and contrary to PERC's statutory charge.

This is certainly a situation where the employer's actions were both egregious and willful bad acts. In early 2010, Kitsap Transit set itself on a deliberate and determined mission to reduce its health care expenditures by eliminating the Premera plan. Its own benefits consultant warned them on multiple occasions that upon failing to locate a cheaper alternative to Premera, if Kitsap Transit did anything to alter the number of covered lives on the Premera plan, including incentivizing migration to other health plans, the Premera plan for the remaining ATU members

[14] *City of Anacortes*, Decision 6863-B (PECB, 2001); citing *City of Bremerton*, Decision 6006-A (PECB, 1998): *Seattle School District*, Decision 5733-B (PECB, 1998); *Mansfield School District*, Decision 5238-A (EDUC, 1996); *PUD 1 of Clark County*, Decision 3815 (PECB, 1991); *City of Kelso*, Decisions 2633 (PECB, 1988).

would be compromised. When this fact was ultimately confirmed in late September 2010 – *when Kitsap Transit still had time to alter its trajectory* – it nonetheless went forward with efforts to move its non-represented employees and members of the Machinists and Teamsters unions to other plans. It then waited over a month, when open enrollment and a new plan year were nearly upon everyone, to first notify ATU of the loss of Premera. Kitsap Transit later claimed it negotiated in "good faith" with ATU at this point, but the die had already been cast and the damage done.

Subsequently, after ATU was forced to file its ULP complaint, the employer sought to defend its behavior by asserting it was helpless at the whim of third parties for which it had no control. The evidence, however, and the findings by the Hearing Examiner, made clear that this feigned helplessness was anything but; instead, the loss of the Premera plan was the result of a deliberate and manipulative strategy by Kitsap Transit to make a significant change in a mandatory subject of bargaining without fulfilling its statutory bargaining obligations.

Thus, the actions by Kitsap Transit were deliberate and unlawful, and its asserted defense clearly lacked merit because there was no evidence that the change in benefits was necessitated by outside forces that Kitsap Transit could not control. Instead, the evidence made clear that the Premera plan was only lost because of conscious and deliberate decisions made by Kitsap Transit that led to its elimination. At a minimum, the "appropriate remedial order" most contain a requirement

for Kitsap Transit to restore the status quo and make the employees fully whole, knowing that the standard for a more extraordinary remedy could be easily satisfied herein given the willful bad acts displayed by Kitsap Transit in this matter.

B. A Make Whole Remedy Must Necessarily Include the Premium Savings Achieved by Kitsap Transit Which Represents the Harm Incurred by the Employees Who Lost the Premera Plan

Kitsap Transit has tried in vain to convince this Court that the Commission's significantly modified remedy to make employees "whole" by requiring the employer to pay any difference in out-of-pocket costs experienced by the employees was statutorily sufficient. The primary argument in support of this position is Kitsap Transit's belief that there is scant evidence in the record documenting any "harm" suffered by the employees as a result of the lost Premera coverage. This argument, however, fails to recognize that the loss incurred from this change was not largely centered around additional expenses borne by employees having to move over to Group Health coverage; rather, it was the loss of having access to a far superior insurance product that provided more desirable care options for employees and their families with respect to how they received their health care. It is this loss for which the employees must be made whole, not necessarily just the direct cost differentials that an individual employee experienced from the change in coverage.

Contrary to assertions made by Kitsap Transit that the record contains little evidence about "any measurable negative impact on

employees"[15] stemming from the loss of Premera, the record actually abounds with such evidence. In quantifying this negative impact, Kitsap Transit seeks to focus the court on the evidence from several witnesses about adverse impacts to their care or that of their family members in having to move to Group Health. But, as noted by the Hearing Examiner, PERC does not have "authority to address claims of personal damages for pain and suffering of individual employees."[16] ATU presented this witness testimony, knowing this to be the case, not to try and quantify all the harm suffered by employees from this change, but instead to elaborate on the real world impacts on employees and their families in moving to Group Health. This witness testimony is not the sum total of the available evidence documenting the loss incurred by the employees and what is necessary to make them whole.

What the employees lost when Premera was eliminated was access to a superior health care benefit and network that was of material and significant importance to them. In Kitsap County, the number of available physicians within the Premera network is far greater than that of Group Health.[17] Within a relatively large county, like Kitsap, in many cases this means that an employee or family member's physician would be in closer proximity to their home or place of work than the more centrally and sparsely located Group Health physicians, reducing travel times and the expenses associated therewith. The Premera and Group Health network

[15] Resp. Br. at 23.
[16] CR: 1898.
[17] CR: 251.

of physicians do not overlap, meaning many families were forced to leave the care of physicians who may have known them for decades and go to a new physician without that personal history. Along with this, Premera's PPO-style plan allows covered members to access the care of required specialists, directly, without having to first work through a primary care physician, which is at the core of the HMO model under Group Health.[18] These are all valuable benefits for many people that allows them greater control over their own health care.

In addition to the type of care, Premera is also a national company with network coverage across the U.S. and Canada.[19] Many people desire such a broad coverage network to access while they are traveling, or as one witness testified, when they have dependent children covered by their plan who are living in other states, either for college or work. Those dependents residing in other States can access an array of physicians within the Premera network regardless of where they are living. In contrast, with Group Health, for dependents living in a vast majority of the different States where Group Health is not present, care is only readily attainable through emergency room visits, as there is no network of Group Health physicians in most States, which can significantly affect the quality of care those dependents receive.[20]

Kitsap Transit has itself recognized the material and significant differences between Group Health and Premera that must be captured in

[18] CR: 346.
[19] CR: 343-45.
[20] CR: 344-45.

any make whole remedy. In their brief, commenting on the financial "incentive" that they unilaterally and unlawfully provided to ATU members (and other employees as well), Kitsap Transit admits that the "objective" of this incentive was to "provide a transition allowance to minimize or eliminate the *impact on employees*...."[21] It is readily admitted by Kitsap Transit that there was a significant impact on the employees by losing Premera, which is why they were willing to offer to pay each of their employees several thousand dollars to ease this "transition." The harm here, for which employees must be made whole, is not only through the direct costs associated with moving to Group Health, but principally centers on the loss of access to a superior health network that holds far more value in the marketplace and among the many ATU members who sought care for themselves and their families through Premera despite the higher costs. Kitsap Transit knows such an "impact" exists, and the only way to account for that impact and make employees whole is to require Kitsap Transit to pay the employees the difference in premium costs between Premera and Group Health, which best approximates the different values in the plans.

In advocating for a reinstatement of the Examiner's Order requiring the employer to transfer the savings it achieved through its unlawful unilateral change back to the affected employees, Kitsap Transit argues that ATU fails to cite to a "single case" where PERC has ordered such a remedy. In fact, several analogous examples exist within PERC's

[21] Resp. Br. at 25.

case law wherein, as the result of a unilateral change in an employee benefit, the employer was ordered to make payments to the affected employees that they would not have normally be entitled to but for the unlawful change.

For instance, in *Battle Ground School District*[22], a complaint was filed by the Union concerning high school cafeteria workers that it represented and the transfer of some of their work to non-represented student workers at a much lower rate of pay. The Examiner, which decision was affirmed by the Commission, found the transfer of the work to constitute unlawful skimming. The Union's primary requested remedy ordering the employer to grant a wage increase it sought during contract negotiations was not awarded; however, the Examiner found that "*the employer cannot be allowed to profit from its illegal acts.*"[23] The employer was ordered to make the employees whole by paying them the difference in hourly wage rates between what the students made and what an entry-level cafeteria worker would make multiplied by the total number of student hours worked, which number was then divided by the number of hours worked by union members. That figure represented the employer's savings that had to be paid back to the members.

Other analogous cases have also involved the payment of funds not otherwise due to employees stemming from a unilateral change. In

[22] *Id.* (emphasis supplied).
[23] Decision 2449-A (PECB, 1986).

Spokane County[26], the employer was found to have unilaterally altered the work schedule for the sergeants from their established "4/10" schedule to a "5/8" schedule. The employer believed this would allow for greater coverage during certain peak periods without having to bring in additional personnel on an overtime basis. In addition to being required to restore the previous "4/10" schedule, the County was mandated to "re-compute the pay for each employee affected by the unlawful unilateral change."[27] Even though the employees would not have otherwise received additional compensation, PERC ordered the County to pay an additional four hours of straight pay for each week the employees were on the "5/8" schedule. The theory was to compensate the employees for the inconvenience and burden of having to work an additional day during the week.

Kitsap Transit cites, approvingly, to *North Franklin School District*[28], for the proposition that PERC has rejected, as a remedy, transferring the savings from a unilateral change to employees. But, in fact, that case is distinguishable and, on principle, supports ATU's position herein. In that case, PERC acknowledged the fact that, ordinarily, back pay to employees who last wages due to the hiring of an outside contract would be part of the standard remedy. However, herein, the amount of money the employer saved was found to not reflect a "carefully construed technical analysis of wages not paid...."[29] The

[26] Decision 5698 (PECB, 1996).
[27] *Id.*
[28] Decision 3980 (PECB, 1992).
[29] *Id.*

Examiner credited testimony by the employer's witnesses showing that, in fact, none of the projected savings from the control actually materialized.

In this situation, however, there is such a technical analysis concerning the difference in values between the Group Health and Premera plans. This analysis was conducted by the actuaries and underwriters for these respective companies when they priced their plans in the open marketplace. The imputed values of the plans have already been established through the overall cost of premiums that they charge in order to individuals to be insured. The delta between these two plans reasonably represents the loss in the benefits when the Premera plan was removed. In fact, Kitsap Transit has accepted this very same line of reasoning based on how it chose to structure the financial incentive that it made available to its employees to move over to Group Health and ease the burden of that impact. The "incentive" was equal to three months of premium differences between the Premera and Group Health plans. The damages assessed by the Hearing Examiner to make the employees whole for the loss uses the *exact same methodology*, with the only exception that the payments were required for a longer period of time.

C. A Remedy Reinstating the Status Quo Ante is Both Necessary and Possible In Light of the Available Evidence

1. Kitsap Transit is Wrong in Asserting that No Other Substitute PPO Plan was Available Constitutes a Verity on Appeal

Despite the obvious flaws in its position, Kitsap Transit continues to perpetuate the mistaken belief that the Commission's findings

concerning the alleged impossibility of a substitute plan constitutes a "verity on appeal."[30] This position is not supported by the evidence in the record, a plain reading of the findings of fact, or basic common sense.

The alleged verities on appeal cited to by Kitsap Transit are centered on Findings of Fact nos. 17 and 22 in the Hearing Examiner's original decision. Those findings read as follows:

> On September 29, 2010, Wallen forwarded the employer a rejection from Premera and explained that Premera's underwriters would not agree to insure only ATU bargaining unit employees, because the group was too small and in light of the Group Health HMO option that was also offered.
>
> On November 2, 2010, Wallen informed the employer by e-mail that he could not find an insurance plan that would offer a PPO plan comparable to the Premera PPO for a group comprised solely of ATU bargaining unit employees.[31]

From these two factual findings by the Examiner, Kitsap Transit draws this unsupported conclusion, which it believes constitutes a verity on appeal: "Kitsap Transit did not have the ability to offer the Premera – or any other PPO plan – in 2011 or any time up to the hearing date."[32]

A plain reading of these findings, however, in no way supports such an overly broad proposition. Finding of Fact no. 17 simply stands for the fact that, given the manipulative actions taken by Kitsap Transit, Premera would not insure just the remaining ATU members. Similarly, Finding of Fact No. 22 narrowly focuses on the efforts of Kitsap Transit's

[30] Resp. Br. at 30.
[31] CR: 1901-02.
[32] Resp. Br. at 32.

broker to locate what he felt was a comparable option to Premera as of November 2, 2010. Neither of these findings go nearly so far as to comment on the overall availability of different plan options that may have existed at the time or the overall probability of securing any such options. The availability of alternative plans remains an open question, which ATU believes was the principal error made by the Commission who found such "impossibility" to exist in the absence of any evidence cited to in the record.

Logically, the position taken by Kitsap Transit is not sensible given the fact that these were findings made by the Hearing Examiner who was the very same person who ordered Kitsap Transit to restore the *status quo ante* by "reinstating a health insurance plan with benefit levels substantially equivalent to the December 31, 2010 Premera PPO plan or implementing another plan option as agreed upon by the union."[33] If, in fact, the Examiner's findings stood for the proposition that finding a substitute PPO plan was impossible, which finding Kitsap Transit now argues is a verity in this appeal, it would make no sense for the same person who made such a finding to then order Kitsap Transit to do the very thing that had been found to be impossible. Such a line of reasoning lacks basic common sense.

2. The Determination by the Commission that Resorting to the Status Quo Could be Impossible is Not Supported by the Evidence

[33] CR: 1905.

In its opening brief, contesting the Commission's finding that restoring the status quo could be an impossibility, ATU noted that Premera had originally re-bid the PPO plan for the 2011 plan year. Kitsap Transit, in its response brief, refutes this notion, calling it "unsubstantiated speculation" and a proposition for which there is "no citation to any evidence in the record."[34] Had Kitsap Transit more closely read ATU's opening brief, specifically the paragraph prior to the passage in the brief that was quoted, it would have discovered both a citation to the evidence and the actual underlying evidence supporting the statements by ATU.

During cross-examination of the employer's witness and insurance broker, John Wallen, the following colloquy with counsel occurred:

> Q: Okay. So this – this was a – they – just so I'm clear because I don't have it in front of me, they had – Premera had put out a full renewal for Kitsap Transit?
> A: Indeed
> Q: So that – that meant that they had made an offer, they were willing to rebid the PPO?
> A: At this point they were – they gave us renewal on existing set of benefits....[35]

The documentary evidence also confirms this fact. In an email on September 16, 2010, Mr. Wallen wrote to Mr. Cartwright indicating that a proposal from Premera had just come through on "Monday night" and it was looking "good."[36]

The primary argument put forward by Kitsap Transit supporting the Commission's impossibility finding was that Premera was "unwilling"

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[34] Resp. Br. at 32.
[35] CR: 504-05.
[36] CR: 1061.

to offer a PPO plan and that the move to a different health plan for the Machinist and Teamsters group (which was fatal to the ongoing viability of the Premera plan) was "driven" by John Witte, the Secretary/Treasurer of the Teamsters, Local 589.[37] Neither of these propositions are true. Kitsap Transit's own insurance broker confirmed that as of mid-September 2010, Premera had in fact offered to re-bid its current plan for the 2011 calendar year. It was only after actions subsequent to this date taken by Kitsap Transit – to incentivize employees to move to Group Health and to negotiate a different health plan with the Teamsters and Machinists unions – that Premera subsequently withdrew its bid.

Likewise, it is, at best, an indulgence of the truth, to now argue that the move by the Machinists and Teamsters groups was "driven" by their representatives. The overwhelming and documented evidence is clear that it was Jeff Cartwright, the employer's HR Director, who initiated and pursued efforts to move all of Kitsap Transit's employees off the Premera Plan. The Machinist and Teamsters unions may have been willing to pursue other health plans, but to suggest that the entire process was driven by anyone other than Mr. Cartwright is an exaggeration of what really happened. Additionally, even if it were the case that the Machinist and Teamsters unions sought such a change, pursuant to the collective bargaining laws of Washington, any such change could have only come about through mutual agreement between Kitsap Transit and those unions. Knowing, as he did, that removing those union members

[37] Resp. Br. at 32, 33.

from the Premera plan without a substitute plan available for the remaining ATU members, Mr. Cartwright could have explained to the Machinist and Teamster unions that Kitsap Transit was not in a position to make such a move at that time because of the impact that it would have had on its other employees. Mr. Cartwright chose not to take such a course, and instead became blinded by the opportunity to move a significant segment of the workforce off the Premera plan even with great consequence to the remaining ATU members.

Since Kitsap Transit worked to undermine the Premera plan, despite its initial rebid, through the use of an incentive payment to move people to Group Health and negotiating the Machinist and Teamster groups to a different plan, it had the ability to try and unwind these arrangements and recreate the previously existing conditions under which Premera's underwriters could offer a PPO plan. Such an endeavor may present considerable challenges, and would require further bargaining with its unions, but the point is that it is possible because absent the changes pursued by Kitsap Transit in late September and October of 2010, Premera had been willing to re-bid the PPO plan and, presumably, would do so again under comparable conditions.

Finally, Kitsap Transit again seeks to attack the credibility of the expert witness presented by ATU who testified about alternative plan options Kitsap Transit could have pursued at the time (and did not), but their critique fails for two reasons. First off, Kitsap Transit simply does

not understand the self-funding option that Mr. McCulloch testified to, which is perhaps why they negligently failed to pursue such an option. As Mr. McCulloch explained in his report and accompanying testimony, the principal advantage of self-funding is that an employer can construct its plan design as it sees fit, so long as it had sufficient reserves and a proper funding structure to pay the claims that come in.[38] Rather than buying a pre-packaged insurance product, with self-funding an employer simply constructs the plan benefits as it desires, secures a third-party administrator, like Cigna Health, to pay and adjudicate claims for the employer, and then establishes a reserve account to pay for those claims and other associated costs like stop-loss insurance.[39] The central point being made by Mr. McCulloch, however, is that the principal advantage of this approach, assuming the other pieces can be secured, is that Kitsap Transit could have constructed a "health insurance plan with benefit levels equivalent to the December 31, 2010 Premera PPO Plan." Admittedly, Mr. Wallen never even gave serious consideration to this option, even though Mr. McCulloch, recreating the variables for the ATU group that existed at the end of 2010, was able to locate a third-party administrator and believed Kitsap Transit could have pursued this option.

The broader point here, however, is that whether or not Kitsap Transit wants to give any credence to ATU's expert witness, the error of law made by the Commission is that in determining an order requiring the

[38] CR: 336-42; CR: 1338-40.
[39] *Id.*

restoration of the status quo could prove impossible, they never commented on any of this evidence involving Mr. McCulloch, let alone any evidence whatsoever. While a specific finding of fact about the availability of alternative plan options was not made by the Hearing Examiner, after receiving all the evidence she clearly felt such was a possibility because that was part of the original Order. The Commission, in reviewing the evidence, could have disagreed. But, the point is this never happened. The Commission does not cite to one iota of evidence about the likelihood of being able to restore a substantially similar benefit, despite commenting in their decision, on three occasions, that it would be "impossible." At a minimum, to make such a determination, the Commission would have been required to at least comment on, and make some adverse finding with respect to, the evidence presented by ATU that at least one alternative plan option did exist. The failure of the Commission to engage in such an analysis was an error of law and arbitrary and capricious that should be overturned.

D. The Additional Evidence Submitted by ATU Should be Admitted Because it Relates Directly to the Commission's March 2013 Decision "At the Time It was Taken"

Kitsap Transit misunderstands and mischaracterizes ATU's argument concerning its motion to receive new evidence under the APA. The motion has nothing to do with whether or not ATU was "dissatisfied with the quality of the evidence" produced during the initial hearing, nor is it an "effort to resuscitate its argument." Rather, the new evidence relates directly to the Commission's final decision on March 21, 2013 and

concerns a material "fact" that goes directly to the validity of that decision. What Kitsap Transit misunderstands is that the new evidence does not relate to the availability of other plan options at the time of the original incident; instead, it goes to the question of whether it was "impossible" or not for Kitsap Transit – at some point in time – to reinstate the status quo. The question of "impossibility" only ripened upon such a finding by the Commission in its March 2013 decision.

The newly acquired evidence at issue has a bearing upon the part of the Examiner's Order that was overturned requiring Kitsap Transit to reinstate a health insurance plan with benefit levels substantially equivalent to the Premera PPO plan or another plan as agreed to by ATU. It was with respect to this aspect of the Order that the Commission noted – on three separate occasions – that compliance with which was "not possible." An "impossibility" is "that which, in the constitution and course of nature or the law, no person can do or perform."[40] Embedded within this definition is a temporal component, meaning the relevant state of existence for whatever object is being described cannot occur *at any point in time.*

In reality, however, around the same time of the Commission's decision, the parties had, in fact, negotiated a resolution to reinstate a substantially equivalent health plan to Premera plan lost at the outset of 2011. If there is evidence showing that just a few years later a substantially equivalent plan was reinstated, such a development would

[40] Black's Law Dictionary 755 (6th ed. 1990).

directly contradict a determination of "impossibility." Thus, the evidence has a material bearing on the decision by the Commission.

This evidence also relates to the final decision by the Commission and would not have been material but for that decision. Prior to the Commission opining about the possibility of restoring a substantially equivalent health plan that was not a question in the case for which ATU could have anticipated and previously submitted evidence on the point. Clearly the Hearing Examiner felt that it was possible to reinstate a substantially equivalent plan, because that is what she ordered. The question over the probability of such an event occurring only ripened when the Commission decided to make a finding of "impossibility." It was only at this point that any evidence about future possibilities in restoring a substantially equivalent plan became material, and this is exactly the nature of the evidence that ATU now seeks to admit.

II. CONCLUSION

For the foregoing reasons, the Examiner's Order should be reinstated in its entirety and the Commission's modified Order (and the Superior Court order enforcing it) should be overturned.

DATED this 11th day of June, 2014, at Seattle, WA

CLINE & ASSOCIATES

By: 

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CERTIFICATE OF SERVICE

I certify that on June 11th, 2014, I caused to be filed via legal messenger the foregoing *APPELLANT'S REPLY BRIEF*, and this *CERTIFICATE OF FILING & SERVICE* in the above-captioned matter. I further certify that on this same date, I caused to be served via Electronic Mail and U.S. Mail true and accurate copies of the same above-referenced documents on the party below:

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I certify and acknowledge under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington, this 11th day of June 2014.

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Paralegal