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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

No. 340881

LEO J. DRISCOLL,

Petitioner,

v.

WASHINGTON STATE INSURANCE COMMISSIONER,
TIAA-CREF LIFE INSURANCE COMPANY, and
METROPOLITAN LIFE INSURANCE COMPANY,

Respondents.

**AMENDED BRIEF OF RESPONDENTS
TIAA-CREF LIFE INSURANCE COMPANY and
METROPOLITAN LIFE INSURANCE COMPANY**

November 16, 2016

Respectfully submitted,

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I. INTRODUCTION

This proceeding is the second appeal of an untimely administrative challenge in which petitioners Leo Driscoll and his wife, Mary Driscoll,¹ seek to unwind a 2011 premium rate increase to their long-term care insurance coverage. Respondent Metropolitan Life Insurance Company (“MetLife”), the 100 percent reinsurer and administrator of Driscoll’s coverage,² filed its rates with the Washington Office of the Insurance Commissioner (“OIC”) and received the OIC’s approval for the increase. Thus, the rate increase in question was implemented with full regulatory authority. It was also contractually appropriate under the express terms of Driscoll’s policy (the “Policy”).

In 2014, almost three years after the rate increase was approved and implemented, Driscoll filed an Application for Adjudicative Proceeding (the “Application”) with Washington’s Insurance Commissioner (the “Commissioner”). The Application contained four Counts, three of which have been abandoned by Driscoll and are not discussed in this submission. Count 3 forms the basis of Driscoll’s appeal.

¹ Because Leo and Mary Driscoll’s arguments are identical in all respects, they are referred to jointly in this submission as “Driscoll.”

² This Response is brought on behalf of both TIAA-CREF Life Insurance Company (“TIAA-CREF”) and MetLife. TIAA-CREF issued the Policy. The block of policies that included Driscoll’s Policy was later assumed by MetLife. TIAA-CREF maintains no ongoing rights or obligations under Driscoll’s Policy. For ease of reference in this Response, MetLife and TIAA-CREF are referred to jointly as “MetLife.”

In Count 3, Driscoll seeks an order directing the Commissioner to withdraw OIC approval for Driscoll's Policy schedule forms (*i.e.*, the piece of paper attached to his Policy on which his premium rate is printed). Driscoll erroneously posits that withdrawal of that approval would result in his future premium rate being reduced. Although Driscoll attempts to characterize this attack as being against the Policy schedule form, his true target – to attack the rate itself – is clear. This would, of course, violate the Filed Rate Doctrine and be impermissible as a matter of law. Presiding Officer George Finkle granted summary judgment for the OIC at the administrative level because Driscoll's Application was time-barred. Superior Court Judge Harold Clarke III affirmed on judicial review and also held that the Application was barred by the Filed Rate Doctrine.

Although Driscoll clearly wants this second appellate Court to reach and rule on the merits of his Application, and to consider fact-based arguments that, he posits, suggest the OIC should not have raised his rate, that result is impossible. The decisions below rested on procedural grounds *only*. Accordingly, this Court's review should also be limited to the many dispositive procedural issues that render Driscoll's Application a nullity. Fully *eight* procedural arguments require this Court to reject Driscoll's Application and affirm:

1. Driscoll was not “aggrieved” by the Commissioner’s approval of MetLife’s rate filing and therefore lacks standing under RCW 48.04.010 to demand a hearing;
2. Driscoll’s Application is time-barred by the 90-day limitation period stated at RCW 48.04.010(3);
3. Driscoll’s Application is barred by the Filed Rate Doctrine;
4. Driscoll has no private right of action to enforce the multitude of highly technical Code sections that undergird his Application; the powers of enforcement for those sections rest with the Commissioner alone;
5. Administrative proceedings exist to resolve disputes between private citizens and the OIC, not private citizens and insurers, meaning MetLife could not be “joined” to this administrative proceeding as a matter of law;
6. Driscoll improperly “joined” MetLife for the very first time on appeal, meaning MetLife should not be a party;
7. Driscoll has pleaded no wrongdoing by MetLife; and
8. Driscoll seeks no measure of relief from MetLife.

Each of these arguments is independently case-dispositive as to MetLife.

Despite this appeal being about procedural issues only, Driscoll inappropriately attempts to argue the merits of his case. In particular, he contends that a declaration submitted by OIC actuary Scott Fitzpatrick in support of the OIC’s summary judgment motion at the administrative level somehow shows malfeasance in the OIC’s rate-review process. This argument fails in several respects. First, and most critically, the decisions below had no nexus to the fact-based argument Driscoll raises now, for the

very first time, in this second appeal. The issue is not properly before this Court and should be rejected. But, second, even if the Court reached the merits of the argument, it would see that Driscoll has, to put it kindly, taken significant liberties with his characterization of the undisputed facts. Not only does Mr. Fitzpatrick's declaration not stand for the proposition that the OIC did something improper, it proves the opposite. MetLife submitted, and the OIC considered, all appropriate information in support of the subject rate filing. The declaration is uncontroverted by any record evidence.

This Court should affirm the Presiding Officer and court below by holding that the OIC's motion for summary judgment was properly granted. MetLife also respectfully asks that it be dismissed as a "named party" to the proceeding due to Driscoll's improper "joinder" of MetLife, but that MetLife be permitted to remain in the proceeding in an *amicus* or "interested party" capacity because the final outcome of the proceeding potentially affects MetLife's rights and obligations under Driscoll's Policy and the policies of other Washington insureds.

II. STATEMENT OF FACTS

A. The OIC Regulates Long-Term Care Insurance

Under the Revised Code of Washington ("RCW" or "Code"), long-term care insurance "provide[s] coverage or services for either

institutional or community-based convalescent, custodial, chronic, or terminally ill care.” RCW 48.84.020(1). Like all forms of insurance issued in Washington, long-term care insurance is regulated by the OIC. RCW 48.01.020; RCW 48.02.060. One aspect of long-term care insurance that is intensely regulated by the OIC is the filing and approval of insurance premium rates. *See* RCW 48.19.030; RCW 48.19.040; WAC 284-54-630. The Washington State Legislature has authorized the OIC as part of its regulatory function to direct that insurers submit rate increase filings with appropriate information to support the filing. *See id.*

When reviewing and approving premium rates, the OIC is guided by an extensive regulatory framework. *See id.* An insurer that wishes to seek a premium rate increase is directed to submit detailed information to the OIC including, among other things, the proposed rate, the actuarial basis for the rate and information to support that the proposed rate is not “excessive, inadequate, or unfairly discriminatory.” [CP 172-173]; *see also* RCW 48.19.020; RCW 48.19.030; RCW 48.19.040; WAC 284-54-630. The Code provides guidelines for determining whether a rate increase is appropriate. *See* RCW 48.19.030; WAC 284-24-065; WAC 284-54-060. The Code also directs the OIC and its actuaries to review the information submitted by the insurer applying for the rate increase and permits the OIC to seek additional information from the insurer if the OIC

deems it necessary and appropriate to the review. [CP 173-174] Based on the OIC's review, the Commissioner may approve or disapprove a rate filing. [CP 174]; *see also* RCW 48.19.060; RCW 48.19.100.

B. The OIC Approved MetLife's Rate Increase Request

On June 10, 2011, MetLife filed a request with the OIC to increase rates for the block of insurance policies that included the Driscoll Policy. [CP 57-58; AR 257] The purpose of the rate filing was to ensure that the anticipated loss ratios of the product met the standards required by the OIC, meaning MetLife sought to ensure that it charged a premium rate that would allow appropriate funds to be available in the future to pay anticipated claims. [CP 200; AR 176] As directed by the OIC, MetLife submitted an actuarial memorandum in support of its rate filing that set forth all information required by the OIC and the Code. [CP 198-213; AR 176-177]

After MetLife submitted all the information required under the applicable insurance statutes and rules to support the rate filing, OIC staff actuaries reviewed MetLife's rate filing. [CP 243; AR 176-177] The OIC issued an order approving MetLife's rate filing in writing on August 17, 2011, after finding that the filing was not excessive, inadequate, or unfairly discriminatory. [CP 235-245; AR 177] In fact, the OIC determined that the rate filing and supporting materials were not different

in form or substance than any other typical rate filing. [CP 244; AR 176] Moreover, the OIC determined the rate filing to be appropriate and supported by the calculations provided to the OIC in MetLife’s actuarial memorandum and other supporting materials. *Id.* After receiving approval from the OIC, MetLife gave written notice of the rate increase to all affected policyholders, including Driscoll. [CP 056; AR 179]

C. Driscoll Filed An Application And Hearing Demand Challenging The Rate Increase Almost Three Years After The Rate Increase Was Approved

Driscoll received actual notice of the rate increase on December 9, 2011. [CP 35 (“[i]t is undisputed that that MetLife gave written notice of the...increase [on] December 9, 2011.”)] Despite receiving written notice of the rate increase on December 9, 2011, Driscoll waited until September 19, 2014 to file an Application and hearing demand challenging that rate increase. [CP 256; AR 256-294] The Application sought to “adjudicate four (4) closely-related counts [arising] from a 41% rate-increase in premiums” for the Policy. [CP 257] Counts 1, 2, and 4 have been abandoned by Driscoll. Petitioner’s Brief 1 (herein referred to as “Pet’s Br.”). Thus, the only Count on appeal before this Court is Count 3:

Count 3. Count 3 seeks relief under the Code that “the [rate increase] approval was and is ungrounded” and that “the Commissioner has authority, grounds, cause, and duty [sic] to hold a hearing and to issue of an order from the Commissioner . . . that directs the insurer to cease use of

and withdraw the changed Policy Schedule forms and other appropriate prospective relief.”

[CP 259 (*emphasis in original*)]

D. The Administrative Proceeding Below

Driscoll filed his Application and hearing demand on September 19, 2014, almost three years after receiving written notice of the rate increase. [CP 256] On November 7, 2014, the OIC filed a motion for summary judgment. [CP 167-245] Driscoll filed a response on December 16, 2014. [CP 070-161] The OIC filed a reply on January 20, 2015. [CP 027-061] Notably, Driscoll did not name MetLife a party to the administrative proceeding. Thus, MetLife could not and did not submit any briefing at the administrative level.

On January 13, 2015, Presiding Officer Finkle, a retired Superior Court Judge, granted summary judgment for the OIC. [CP 001-007] In taking the facts in the light most favorable to Driscoll, the Presiding Officer found that Driscoll failed to comply with the requirement in RCW 48.04.010 that he file his Application and hearing demand not later than 90 days after he received notice of the rate increase. [CP 005] Driscoll waited some 33 months to file, so his Application and hearing demand were time-barred. *Id.* Presiding Officer Finkle also determined that two affidavits submitted by Driscoll in support of Driscoll’s summary

judgment response papers were not evidence and could not be considered by the Presiding Officer because they were “argumentative, speculative, and/or not based on personal knowledge or reasonable inferences, as required by CR 56(e) and ER 602, nor do they constitute insurance or other expert testimony under ER 702.” [CP 003-004]

E. Driscoll’s First Appeal: Judicial Review Of The Administrative Proceeding

On March 12, 2015, Driscoll filed a Petition for Judicial Review with the Superior Court. [CP 89-121] On March 24, 2015, Driscoll filed an Amended Petition for Judicial Review (the “Petition”). [CP 1-33] The Petition purported to “join” MetLife to the proceeding for the very first time. [CP 89-121] On May 1, 2015, Driscoll filed a Brief in Support of his Amended Petition for Judicial Review. [CP 34-66] In these two filings, Driscoll sought judicial review of Counts 2, 3, and 4 of the Application. [CP 37-39] Driscoll brought no Counts and sought no relief against MetLife.

The parties (including MetLife) submitted briefs and participated in oral argument on August 28, 2015. Judge Clarke issued an oral ruling on August 28, 2015: (i) affirming that Driscoll’s claims were time-barred; and (ii) holding that Driscoll’s claims were barred by the Filed Rate Doctrine. Tr. of Aug. 28, 2015 Ruling by Judge Clarke, a true and correct

copy of which is attached hereto as **Exhibit 1 located in Appendix B**. A written order was issued on November 25, 2015. [CP 70-71]

On February 9, 2016, Driscoll filed a notice of appeal with this Court. [CP 81-86] He filed a corresponding brief on August 29, 2016. This brief responds to Driscoll's August 29, 2016 brief.

III. STANDARD OF REVIEW ON APPEAL

This appeal is from the judgments of an OIC Presiding Officer and a Superior Court Judge that upheld an order of the Commissioner. Washington courts have explained the appellate standard of review as follows: “[w]e apply a substantial evidence standard to an agency’s findings of fact but review de novo its conclusions of law.” *Chandler v. State, Office of Ins. Comm’r*, 141 Wn. App. 639, 647 (2007). Additionally, Washington courts recognize the broad authority given to the Commissioner and defer to the Commissioner’s interpretation of insurance statutory law, including when regulating rates:

The commissioner can enforce decisions, and can issue declaratory orders in contested cases. RCW 48.02.080, 34.05.240. In addition, although a commissioner cannot bind the courts, the court appropriately defers to a commissioner’s interpretation of insurance statutes and rules.

Credit General Ins. Co. v. Zewdu, 82 Wn. App. 620, 627 (1996); *Retail Store Emps. Union*, 87 Wn.2d 887, 898 (1976) (“We may place greater

reliance than usual upon an administrative statutory interpretation in this case because the commissioner has been entrusted with very broad discretion and responsibility in the administration of RCW 48.19.170(2)(b) and the other statutes regulating rating organizations”).

Similarly,

[W]hen reviewing factual issues, the substantial evidence standard is highly deferential to the agency fact finder. When an agency determination is based heavily on factual matters that are complex, technical, and close to the heart of the agency’s expertise, we give substantial deference to agency views. Under this standard, evidence must be of a sufficient quantum to persuade a fair-minded person of the truth of a declared premise. But courts will not weigh the evidence or substitute our judgment regarding witness credibility for that of the agency. Findings of fact to which no error has been assigned are verities on appeal.

Chandler, 141 Wn. App. at 647-48.

IV. ARGUMENT

A. **Driscoll Is Not “Aggrieved” Under RCW 48.04.010; He Therefore Lacks Standing To Challenge The 2011 OIC Order Approving MetLife’s Request To Increase Rates**

This Court’s analysis should begin with procedural hurdles that bar Driscoll’s challenge entirely. The first of those hurdles is standing. Standing is defined as a “party’s right to make a legal claim or seek judicial enforcement of a duty or right.” *State v. Link*, 136 Wn. App. 685, 692 (2007) (quoting *Black’s Law Dictionary* (8th ed. 2004)). Standing, when created by statute, is deemed to vest only when a party satisfies the

prerequisites set forth in the statute. *See Kleven v. City of Des Moines*, 111 Wn. App. 284, 290 (2002) (evaluating whether a party had standing under the Washington Public Disclosure Act by examining the language of the Act). It is axiomatic that a person who lacks standing may not proceed with an administrative or judicial challenge, or an appeal such as the one presently before this Court. *Trinity Universal Ins. Co. of Kan. v. Ohio Cas. Ins. Co.*, 176 Wn. App. 185, 200 (2013) (“The claims of a plaintiff who lacks standing cannot be resolved on the merits and must fail.”) (*citation omitted*).

In this case, Driscoll lacks standing to challenge the August 17, 2011 OIC order that ultimately resulted in Driscoll experiencing a premium rate increase because Driscoll is not an “aggrieved” person under RCW 48.04.010(1). RCW 48.04.010(1) provides that:

(1) . . . The commissioner shall hold a hearing:

(b) . . . upon written demand for a hearing made by any person *aggrieved* by any act . . . failure of the commissioner to act . . . or *order* of the commissioner[.]

RCW 48.04.010(1)(b) (*emphasis added*). Thus, in order for standing to lie, Driscoll must demonstrate that he was “aggrieved” by the August 17, 2011 order that permitted MetLife to raise his rate. *See* RCW 48.04.010(2). Driscoll has not made such a showing and cannot do so as a

matter of law.³

The word “aggrieved” is not defined at RCW 34.05.010, which states the definitions applicable to Code provisions in Title 48. When a term is undefined, courts generally turn to the dictionary for guidance. *City of Spokane v. Dep’t of Revenue*, 145 Wn.2d 445, 454 (2002) (“When a statute fails to define a term, we look to the regular dictionary definition when a term has a well-accepted, ordinary meaning.”). But whenever “an otherwise common word [such as “aggrieved”] is given a distinct meaning in a technical dictionary or other technical reference and has a well-accepted meaning within the industry,” we turn instead to the technical, rather than general purpose, dictionary to resolve the word’s definition. *Spokane*, 145 Wn.2d at 454. Black’s Law Dictionary, a technical dictionary, defines “aggrieved” as: “(Of a person or entity) having legal rights that are adversely affected; having been harmed by an infringement of legal rights.” *Aggrieved*, *Black’s Law Dictionary* (10th ed. 2014).

Driscoll was not “aggrieved” by the OIC order granting MetLife’s request to raise rates for at least three independent reasons, all of which

³ Driscoll attempts to sidestep his lack of standing by alleging that he was not aggrieved by the August 17, 2011 order but, rather, by the OIC’s alleged failure to *disapprove* MetLife’s request to increase his rate. Even if Driscoll’s challenge could properly be characterized as an attack on an agency inaction (it cannot), however, the Application would still fail for the reasons set forth in this Section of MetLife’s Brief, namely, that Driscoll could not have been “aggrieved” by an agency inaction because the OIC was adjudicating MetLife’s rights, not Driscoll’s.

emanate from the proposition that his legal rights have not been adversely affected or infringed. First, Driscoll had no right to static premium rates. His Policy specifically states that premium rates can be increased and Driscoll himself admits that his rate could go up as a matter of contract. [CP 35; AR 04] MetLife and, by extension, the OIC cannot have adversely affected Driscoll's legal rights by exercising a right to raise rates that was prescribed in a contract (the Policy) to which Driscoll was a party. *See* CP 35; *see also* *Conrad v. Int'l Ass'n of Machinists & Aero. Workers*, 338 F.3d 908, 913 (8th Cir. 2003) ("The IAM is not liable to Conrad because TWA chose to exercise its contractual right under the Agreement.").

Second, the OIC order that forms the basis of Driscoll's challenge did not determine *Driscoll's* legal rights; it determined *MetLife's* legal rights. Driscoll was never a "party" to the rate increase request or "order" that permitted MetLife to raise rates. "Party" is defined at RCW 34.05.010(12) as: "a person to whom the agency action is *specifically directed.*" (*emphasis added*). Similarly, "order" is defined as: "a written statement *of particular applicability* that finally determines the legal rights, duties, privileges, immunities, or other legal interests *of a specific person or persons.*" RCW 34.05.010(11)(a) (*emphasis added*). It was MetLife alone that filed for a rate increase with the Commissioner. When

that rate increase was granted, the agency action that resulted – the approval of new rates – was *specifically directed* to MetLife, the “party” that sought action from the Commissioner. In the same vein, the August 17, 2011 written “order” of the Commissioner (permitting MetLife to raise rates) was issued and *particularly applicable* to, and governed the legal rights of, just one *specific person* – MetLife.⁴ Driscoll was not a party to the rate increase request or decision, and has no standing to challenge the order that resulted therefrom. *See Newman v. Veterinary Bd. of Governors*, 156 Wn. App. 132, 147 (2010) (finding that the petitioners’ argument that they had standing under the Administrative Procedure Act was based “on the erroneous assertion that they [we]re parties to” the agency proceeding).

This point was clearly established in a more recent, related proceeding initiated by Driscoll. *See In re Driscoll*, Admin. Dkt. No. 16-002 (“*Driscoll I*”). In *Driscoll II*, Driscoll filed an agency action and demand for hearing in which he sought to challenge a July 10, 2015 OIC order granting MetLife’s request to increase premium rates, including Driscoll’s rate. Driscoll and the OIC cross-moved for summary judgment. The OIC prevailed. In granting summary judgment for the OIC, Presiding

⁴ For the sake of Title 48, the term “person” is defined to include entities such as MetLife. RCW 48.01.070.

Officer William Pardee determined, on facts nearly identical to those presently before this Court, that Driscoll lacked standing to proceed with his challenge because he was not “aggrieved” by the OIC order that permitted MetLife to raise rates. A true and correct copy of Presiding Officer Pardee’s summary judgment opinion is attached hereto for the Court’s convenience as **Exhibit 2 located in Appendix C.**⁵ Presiding Officer Pardee reasoned that the Commissioner’s July 10, 2015 order permitting MetLife to raise rates governed MetLife’s rights, not Driscoll’s. *Driscoll II*, Admin. Dkt. No. 16-002 at 8. The fact that Driscoll may have experienced a downstream effect from the approval of MetLife’s request to increase rates was immaterial and insufficient to confer standing. *Driscoll II*, Admin. Dkt. No. 16-002 at 9-10. This Court should follow the rationale and holding in *Driscoll II*.

Finally, Driscoll has pleaded no facts, presented no evidence, and failed entirely to carry his burden of demonstrating, as he must, that he would have received a *lower* premium rate if the OIC had conducted its rate-making analysis in a different way. RCW 34.05.570(1)(a) (“The burden of demonstrating the invalidity of agency action is on the party

⁵ Although *Driscoll II* is not binding on this Court, MetLife notes that this Court should afford significant deference to Presiding Officer Pardee’s rationale and holding, particularly because the facts in *Driscoll II* are nearly identical to the facts in this proceeding. See *Credit Gen. Ins. Co.*, 82 Wn. App. at 627 (“[A]lthough a commissioner cannot bind the courts, the court appropriately defers to a commissioner’s interpretation of insurance statutes and rules.”).

asserting invalidity[.]”). Driscoll cannot be “aggrieved” (let alone have standing) if, in fact, his premium rate might have remained the same or even been higher under a different OIC analysis. To the extent he survives the other procedural hurdles set forth above and elsewhere in this brief, it remains Driscoll’s burden to demonstrate the existence of an actual, justiciable harm that adversely affected his legal rights in the form of an agency error that resulted in his premium rate being set too high. *See* RCW 34.05.570(1)(a); RCW 34.05.570(1)(d). He has failed to do so.⁶

B. Driscoll’s Application Fails Because Driscoll First Sought Relief Outside The Statutory 90-Day Limitation Period; His Claims Are Time-Barred

Even if Driscoll could somehow withstand the foregoing standing arguments, he runs headlong into the 90-day time-bar prescribed at RCW 48.04.010(3).

1. RCW 48.04.010(3) Prescribes A 90-Day Limitation Period; Driscoll Failed To File His Application And Demand A Hearing Timely

Driscoll’s right to demand a hearing, if any, arose under RCW 48.04.010(3). RCW 48.04.010(3) governs hearing demands arising

⁶ In addition to destroying standing, Driscoll’s failure in this regard also renders his claim moot because the agency and courts cannot redress a purely speculative harm. *See* RCW 48.04.010(1)(b) (requiring that Driscoll be “aggrieved”); *see also Wash. Educ. Ass’n v. Wash. State Pub. Disclosure Comm’n*, 150 Wn.2d 612, 622-23 (2003) (instructing that jurisdiction requires a “justiciable controversy,” which is defined as “(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, . . . (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic[.]”).

pursuant to Title 48, and provides:

(3) Unless a person aggrieved by a written order of the commissioner demands a hearing thereon within ninety days of receiving notice of such order . . . the right to such hearing shall conclusively be deemed to have been waived.

RCW 48.04.010(3). In other words, failure to demand a hearing within 90 days of the date on which an aggrieved person has notice of an order of the Commissioner does fully, finally, and forever foreclose that person's right to seek redress in an administrative proceeding. *Id.*; *Erection Co. v. Dep't of Labor & Indus. of State of Wash.*, 121 Wn.2d 513, 518 (1993) (explaining that the word "shall" in a statute imposes a mandatory requirement unless a contrary legislative intent is apparent); *Crown Cascade v. O'Neal*, 100 Wn.2d 256, 261 (1983) (same).

In this proceeding, Presiding Officer Finkle determined, and Driscoll subsequently admitted, that he had notice of the Commissioner's order approving MetLife's rate increase request on December 9, 2011.⁷ [CP 28 at ¶ 17] Thus, at the very latest, Driscoll was required to demand a hearing by March 10, 2012 – 90 days after he had notice. Yet he did not take action until September 19, 2014, some 33 months after he had notice.

⁷ Although Driscoll admits to having notice of the Commissioner's August 17, 2011 order on December 9, 2011, he contends without supporting facts that he did not have notice that MetLife's rate increase request was not adequately supported by information until some unspecified date after July 16, 2012. Pet's Br. 1. This argument is a red herring. Even assuming, *arguendo*, that the clock did not begin to run until July 16, 2012 or thereabouts, as baldly posited by Driscoll, his hearing demand was still filed more than two years later, well beyond the 90-day limit.

[CP 28 at ¶ 18, 113 at ¶ 1]; Pet's Br. 21. Presiding Officer Finkle and Judge Clarke correctly determined that Driscoll's Application and hearing demand were untimely. This Court should affirm.

2. Driscoll's Arguments Against The Application Of RCW 48.04.010(3)'S 90-Day Limitation To The Facts Of This Proceeding Are Unavailing

Driscoll responds with the irreconcilable proposition that he is, in fact, subject to no time limitation at all. Pet's Br. 19-21. He posits that RCW 48.04.010(1)(b) and RCW 48.04.010(3) – though part of the very same Code section – should be read separate and apart from one another as though they were stand-alone provisions. RCW 48.04.010(1)(b), Driscoll contends, allows him to challenge the rate-making process at any time (*i.e.*, subject to no time-bar at all); whereas RCW 48.04.010(3) prescribes a 90-day time-bar for only those agency actions that result in a *written* order of the Commissioner. Pet's Br. 20. Because, according to Driscoll's reading, RCW 48.04.010(1)(b) does not require a written order of the Commissioner to trigger one's right to demand a hearing and does not expressly include a 90-day time-bar such as the one found directly below in RCW 48.04.010(3), Driscoll feels he can challenge the OIC's rate-making process at any time simply by couching his challenge as an attack on an "inaction" of the Commissioner (in this case, an alleged failure by the Commissioner to *disapprove* MetLife's rate increase

request), rather than attacking the written order that was, in fact, issued by the Commissioner on the very same set of issues and permitted MetLife to raise rates. This argument fails for three independent reasons.

First, Driscoll erroneously presupposes that he has standing and a private right of action to challenge the rate-making process or an action (or “inaction”) of the Commissioner. As discussed elsewhere in this brief, he has neither. *See* Sections IV.A, IV.D.

Second, Driscoll’s proposed reading of RCW 48.18.110 would have the absurd and irreconcilable effect of abrogating the 90-day time limit set forth in RCW 48.04.010(3). Such a reading would run afoul of well-settled principles of statutory construction. If a statute’s meaning is plain on its face, the Court must give effect to that plain meaning. *State v. J.M.*, 144 Wn.2d 472, 480 (2001). Courts will not read statutory language so as to render any portion of the statute meaningless. *Friends of Columbia Gorge v. Wash. State Forest Practices*, 129 Wn. App. 35, 47 (2005). Further, courts assume that the legislature did not intend for the interpretation of statutes to produce an absurd result and will construe statutes to avoid the possibility of an absurd result. *Esparza v. Skyreach Equip.*, 103 Wn. App. 916, 938 (2000). In particular, courts will not read one statutory provision to abrogate or render another provision meaningless, because to do so would produce an absurd result that is out

of alignment with the legislative intent behind the statutes. *State v. Bash*, 130 Wn.2d 594, 602 (1996); *State ex rel. Peninsula Neighborhood Ass'n v. Wash. Dep't of Transp.*, 142 Wn.2d 328, 342 (2000); *Employco Pers. Servs., Inc. v. City of Seattle*, 117 Wn.2d 606, 614 (1991); *State v. Derenoff*, 182 Wn. App. 458, 464 (2014). Driscoll's proposed reading would produce an absurd result by rendering the 90-day time-bar set forth at RCW 48.04.010(3) meaningless. If Driscoll's reading were correct, insureds could circumvent literally *every* order of the Commissioner by attempting to belatedly attack the "process" or "inaction" that led to the entry of the order. Thus, even though a written order was, in fact, entered, the 90-day limit for challenging that order could be circumvented with impunity.

Case in point: this very proceeding. The OIC issued a written order permitting MetLife to raise rates on Driscoll's policy. Assuming, *arguendo*, that Driscoll had standing and a private right of action, he had 90 days to challenge that written order, but failed to do so. Instead, almost three years later, he came forward to belatedly challenge the *process* that led to the order (*i.e.*, the Commissioner's alleged failure to *disapprove* MetLife's rate filing). Playing a similar hypothetical forward to its logical conclusion, there would be nothing to stop an insured, proceeding under Driscoll's reading of the statute, from challenging the process that led to a

rate increase (and, in effect, challenging the rate increase itself) 20, 50, or even 100 years after the rate increase was approved.⁸ There would be absolutely no closure, ever, for consumers or insurers alike regarding their rates – and, in a broader sense, there would be no closure regarding any decision made by the Commissioner on any issue at all. The only way to avoid this kind of absurd result is to read RCW 48.04.010(1)(b) and RCW 48.04.010(3) together to impose a 90-day time-bar.⁹

Third, this entire debate is academic because Driscoll *is* challenging a written order of the Commissioner. Even if his reading of RCW 48.04.010(b)(1) were correct (meaning a non-written order of the Commissioner is never subject to a time-bar), it would not change the

⁸ In fact, not only rate increase determinations would be affected, but *every* decision of the OIC. If Driscoll’s reading of the statute were correct, insureds could attack *every* OIC decision at any time simply by demanding a hearing on the OIC’s decision-making process.

⁹ Driscoll cites *Landmark Development, Inc. v. City of Roy*, 138 Wn.2d 561 (1999), in support of his argument that the 90-day time-bar applies to RCW 48.04.010(3) but not to RCW 48.04.010(1)(b). In *Landmark*, the Supreme Court interpreted legislation that provided direction to only three of the four types of municipal corporations that were engaged in water purveying and/or sewer services. Relying on the doctrine “expressio unius est exclusio alterius: the expression of one is the exclusion of the other,” the Court found that the inclusion of only three of the corporations added “forceful argument to an interpretation that the Legislature’s exclusion of the remaining fourth type of corporation . . . was intentional.” 138 Wn.2d at 571-72. *Landmark* is distinguishable from this proceeding. The *Landmark* Court dealt with the “[l]egislative inclusion of certain items in a category,” and the exclusion of one item from that category was deemed intentional. Here, by contrast, RCW 48.04.010 does not involve items in any sort of category. As a result, the legislature’s supposed failure to include the 90-day time-bar in both RCW 48.04.010(3) and RCW 48.04.010(1)(b) does not lead to the conclusion, under *Landmark* or any other authority, that the 90-day time-bar does not apply to challenges arising under RCW 48.04.010. *Cf. Cerrillo v. Esparza*, 158 Wn.2d 194, 207 (2006) (rejecting application of “expressio unius est exclusio alterius”).

result of this proceeding because Driscoll's claim falls squarely under RCW 48.04.010(3), which prescribes a 90-day time-bar. As Driscoll correctly notes, he must be "aggrieved" to demand a hearing under RCW 48.04.010. Pet's Br. 19-20. He claims to be challenging the process that led to him receiving a rate increase; but that process, taken by itself, did not cause Driscoll to be "aggrieved." He could only (arguably) have been "aggrieved" once the Commissioner entered an order permitting MetLife to increase his premium rate. Driscoll recognizes that he cannot divest his claims from the Commissioner's written order. He admits that Paragraph 3.5 of Count 3 of his Application "alleges that the OIC's . . . approval of the subject rate increase [*i.e.*, the Commissioner's written order approving the rate increase] . . . was unfounded." *Id.* at 19. So, in fact, Driscoll *is* challenging the written order itself and not the underlying process.

Relatedly, Driscoll is clear in his papers that his endgame is to unwind the rate increase so that his rate would be reduced to the level he experienced before the Commissioner's written order was entered. Pet's Br. 1, 31; CP 290. His ultimate goal, therefore, is to have the OIC reverse or repeal the written order that resulted in his new premium rate because unless that written order is reversed or repealed, he cannot be charged a

lesser rate as a matter of law under the Filed Rate Doctrine.¹⁰ While Driscoll has attempted to style his attack as being against the rate-making process, this Court should not be swayed by smoke and mirrors. His attack only prevails if the written order comes down. So this dispute is, at its very core, just a poorly camouflaged attack on the written order itself.

3. Driscoll's Advocacy For The Application Of A Three-Year Statute Of Limitations, If Any, Misses The Mark; If Any Statute Of Limitations Were Applicable, It Would Be A Two-Year Statute, Not A Three-Year Statute

In one final attempt to evade the 90-day limitation at RCW 48.04.010, Driscoll contends that if he is subject to any temporal limitation at all, it is the three-year statute of limitations governing injuries to personal property at RCW 4.16.080. Pet's Br. 27-29. This argument fails for three reasons.

i. *Statutes Of Limitation Apply To Civil Court Actions, Not Administrative Proceedings Such As This Proceeding*

Driscoll's advocacy for a three-year statute of limitations is a classic attempt to put a square peg in a round hole. Statutes of limitation govern the time within which one may bring a *civil court action*. This is not a civil court action. Though it is being heard by the Washington Court

¹⁰ The Filed Rate Doctrine is discussed *infra* at Section IV.C.

of Appeals, it is still an administrative action. As such, it is governed by Washington's Administrative Procedure Act. *See* RCW 34.05.501, *et seq.* The statutes of limitation applicable to civil court actions have no bearing on the time within which one must initiate an administrative action. *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 554 n.1 (2009) (explaining that a "statute of limitations governs when a party must initiate *judicial* action," not agency action) (*emphasis added*). Indeed, Washington's legislature specifically acknowledged at RCW 4.16.005 (the same Chapter from which Driscoll seeks to extract a three-year statute of limitations) that the statutes of limitation established in Chapter 4.16 are inapplicable to situations where "a different limitation is prescribed by a statute not contained in this chapter." Driscoll's Application was governed by a separate statute, RCW 48.04.010, which is applicable to agency actions and gave him 90 days to file.¹¹

¹¹ MetLife notes that the application of a 90-day time-bar makes good practical sense. Significant regulatory decisions, such as the setting of premium rates, are the kinds of agency determinations that need to be fully and finally resolved quickly so both the insurer and its consumers have closure on the appropriate rate. Once a new premium rate has been implemented, it is nearly impossible to subsequently unwind. If a two-year or three-year statute of limitations were to apply, as opposed to a 90-day time-bar, insurers and consumers alike would be prejudiced by a protracted period of uncertainty about their rates, and the OIC would, in effect, be stripped of the authority vested by the state legislature to exercise decisive regulatory primacy over matters involving insurance rate-making.

ii. *A Three-Year Statute Of Limitations Is Inapplicable Because Driscoll Has Not Sustained An Injury To Any Property Right*

Second, if a statute of limitations were somehow deemed to apply to this administrative proceeding, it would not be the three-year statute Driscoll proposes. Driscoll seeks to apply RCW 4.16.080, which establishes a three-year statute of limitation for actions alleging the “taking, detaining or injuring [of] personal property.” RCW 4.16.080(2). This provision applies only to certain direct invasions of a person’s property rights.¹² Driscoll’s Policy remains in-force and valid. The fact that Driscoll’s premium rate increased – which was appropriate under the terms of his Policy – will not prevent Driscoll from enjoying the benefits of his coverage should the need for a claim someday arise. [CP 35] No property right has been “tak[en], detain[ed] or injur[ed].”

iii. *If A Statute Of Limitations Were Held To Apply, It Would Be The Two-Year “Catch-All” Statute*

If any statute of limitation were to apply, it would be the two-year “catch-all” statute of limitations set forth at RCW 4.16.130.¹³ The facts

¹² Driscoll dedicates a portion of his argument to whether there exists a distinction, for purposes of determining the applicable statute of limitations, between direct and indirect injuries. Whether such a distinction exists is immaterial in this proceeding, because Driscoll cannot establish that any property of his has been “tak[en], detain[ed] or injur[ed],” as required by RCW 4.16.080.

¹³ See, e.g., *Stenberg v. Pac. Power & Light Co., Inc.*, 104 Wn.2d 710, 720-21 (1985) (discussing general application of two-year statute of limitations to a range of causes of

alleged by Driscoll in Count 3 – that the OIC failed to perform an appropriate analysis before granting MetLife’s rate filing – clearly do not fall under any of the specific statutes of limitation established in Chapter 4.16 of the Code. In situations where the facts do not fall under a specific statute, the two-year “catch-all” statute applies. RCW 4.16.130; *Sorey v. Barton Oldsmobile*, 82 Wn. App. 800, 806 (1996) (explaining that an action falls within the “catch-all” statute when there is no other applicable statute of limitations); *Stenberg v. Pac. Power & Light Co., Inc.*, 104 Wn.2d 710, 721 (1985) (same). Driscoll had notice of the rate increase on December 9, 2011 at the latest and would, under a two-year statute, have been required to file his Application no later than December 9, 2013. He failed to do so.

C. Driscoll’s Application Is Barred In Its Entirety By The Filed Rate Doctrine

Even if Driscoll were to convince the Court that his Application is not subject to the 90-day limitation at RCW 48.04.010, the Application would still be barred in its entirety by the Filed Rate Doctrine. The Filed Rate Doctrine provides that any rate filed with and approved by a state’s

action for which no other statute of limitations is specified) (citing, *e.g.*, *Mitchell v. Greenough*, 100 F.2d 184 (9th Cir. 1938) (action to recover damages for conspiracy to deprive party of right to practice law)); *Aldrich v. Skinner*, 98 Fed. 375 (C.C.W.D. Wash. 1899) (action against stockholder of insolvent national bank); *Grussemeyer v. Harper*, 187 Wn. 508 (1936) (action by stockholders against former directors for loss to corporation)); *see also Mayer v. Seattle*, 102 Wn. App. 66, 75 (2000) (applying the two-year statute of limitations for negligent injury to real property).

governing regulatory agency is deemed as a matter of law to be *per se* reasonable and to be unassailable in the courts by consumers who are charged the approved rate. *McCarthy Fin. v. Premera*, 182 Wn.2d 936, 942 (2015); *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 331-32 (1998) (explaining that the Filed Rate Doctrine limits consumers' power to challenge the reasonableness of agency-approved rates for regulated entities). Once MetLife filed its rates with the OIC and the filing was approved, the rate charged to Driscoll was and is deemed as a matter of law to be *per se* reasonable and unassailable by Driscoll in the courts.

This issue was recently settled by the Washington Supreme Court in *McCarthy*. Plaintiffs in that case sought to challenge certain insurance premium rates charged by an insurer by bringing claims against the insurer under Washington's Consumer Protection Act. The *McCarthy* court noted that the insurance rates at issue were "approved by the Washington State Office of the Insurance Commissioner." *Id.* at 938. The court further observed that:

The "filed rate" doctrine, also known as the "filed tariff" doctrine, is a court-created rule to bar suits against regulated utilities involving allegations concerning the reasonableness of the filed rates. This doctrine provides, in essence, that any "filed rate" – a rate file with and approved by the governing regulatory agency – is *per se* reasonable and cannot be the subject of legal action against the private entity that filed it. The purposes of the "filed rate" doctrine are twofold: (1) to preserve the agency's primary

jurisdiction to determine the reasonableness of rates, and (2) to insure that regulated entities charge only those rates approved by the agency. These principles serve to provide safeguards against price discrimination and are essential in stabilizing prices.

Id. at 942 (quoting *Tenore*, 136 Wn.2d at 331-32). Although the Filed Rate Doctrine traces its roots to the utilities context, the *McCarthy* court concluded that the doctrine is equally applicable to insurance rates. *Id.* at 943. The *McCarthy* court ruled for the insurer and affirmed the trial court's dismissal of the action, holding that "[u]nder the nationally-recognized court created 'filed rate doctrine,' once an agency approves a rate, such as a health insurance premium, courts will not reevaluate that rate because doing so would inappropriately usurp the agency's role." *Id.*

In this case, Judge Clarke ruled that the Filed Rate Doctrine bars Driscoll's claims in their entirety.¹⁴ [CP 70-71]. Judge Clarke correctly held that the Filed Rate Doctrine prohibited not only a direct challenge by

¹⁴ Driscoll argues that "MetLife and T-C Life first asserted the filed rate doctrine defense in their 6-12-2015 brief filed in the court proceedings (CP 156-210)." Pet's Br. 11-12. Though he stops short of alleging that MetLife is precluded from asserting the Filed Rate Doctrine because it was not raised at the administrative level, MetLife feels it appropriate to address the issue. As set forth in Section IV.E, Driscoll failed to name MetLife as a party to the administrative proceeding and, instead, inappropriately "joined" MetLife for the first time on appeal. MetLife therefore had no opportunity to be heard at the administrative level. MetLife raised the Filed Rate Doctrine at its first opportunity once it became a "party" to the proceeding. Fundamental principles of Due Process require that MetLife be given a full and fair opportunity to present all defenses available to it, including a defense that could only be presented on judicial review due to Driscoll's failure to join MetLife. See *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("Due process requires an opportunity to present every available defense.").

Driscoll to the rate he is being charged, but also a challenge to the rate-review process undertaken by the OIC to set that rate because the process by which the OIC determined the appropriate rate is inherent in the rate itself, and Judge Clarke could not direct that the rate-review process be scrutinized or altered without infringing on the OIC's exclusive and unassailable authority to set rates. *See id.*; Pet's Br. 17-18; Ex. 1. According to Judge Clarke, allowing Driscoll to challenge the rate-making process would require the court to circumvent the Filed Rate Doctrine altogether and would, in effect, cause the doctrine to disappear. *See Ex. 1* at 14:16-18. Similarly, in granting summary judgment for the OIC on nearly identical facts and claims in *Driscoll II*, Presiding Officer Pardee followed Judge Clarke's reasoning under *McCarthy* and held that Driscoll's claims are barred by the Filed Rate Doctrine. *See Ex. 2* at 10-12.

Driscoll now attempts to argue around *McCarthy* and the rationale applied by Judge Clarke and Presiding Officer Pardee. His efforts are unavailing. Driscoll first contends that because he is seeking only prospective relief in the form of a forward-looking rate reduction (as opposed to money damages for past "overpayments" of premium), his claim falls outside the Filed Rate Doctrine. Driscoll is wrong. He offers no support at all for that proposition aside from positing, baldly, that

seeking prospective relief will not force the Court to reevaluate the reasonableness of his rate. Pet's Br. 17. Although *McCarthy* happened to involve a claim for damages for past "overpayments" of premium, the Supreme Court never limited its decision to those facts. Rather, the crux of *McCarthy* is that courts cannot "reevaluate rates approved by the OIC," period, because to do so would "inappropriately usurp the role of the OIC." *McCarthy*, 182 Wn.2d at 943. The prospective relief Driscoll seeks would require this Court to intervene and order the reevaluation and modification of his current premium rate so he pays a different (lower) rate in the future, which is just as inappropriate under the Filed Rate Doctrine as it would be if he were asking the Court to retroactively adjust his premium rate and award damages.

Driscoll next attempts to characterize his attack as being against his "Policy Schedule" form – *i.e.*, the piece of paper, attached to his Policy, on which his approved rate is printed – as opposed to the approved premium rate itself. Pet's Br. 17. This argument fails to pass the straight face test. Driscoll's true intention – to attack his premium rate – is transparent. Driscoll asks this Court to order the Commissioner:

To withdraw the OIC's approval of [MetLife's] use of changed "Policy Schedule" forms issued by [MetLife]. If new "Policy Schedule" forms are to be used (as proposed by Count 3) *they will reflect rates approved by the OIC.*

Id. (emphasis added). In other words, Driscoll wants a new schedule form *with a lower rate printed on it*; not just a new schedule form. Driscoll's request for a new schedule form that "reflect[s] rates that are approved by the OIC" is telling because Driscoll's current schedule form *already* reflects the rate approved by the OIC. Driscoll has failed to carry his burden to show the contrary. See RCW 34.05.570(1)(a); RCW 34.05.570(1)(d); *B&R Sales, Inc. v. Dep't of Labor & Indus.*, 186 Wn. App. 367, 374-75 (2015) (reiterating that a party challenging agency action bears the burden under the Administrative Procedure Act of establishing the action's invalidity). It is plain that Driscoll does not actually want a new schedule form, he wants a new rate. That is relief this Court cannot grant without violating the Filed Rate Doctrine.¹⁵ *McCarthy*, 182 Wn.2d at 942; *Tenore*, 136 Wn.2d at 331-32.

Finally, Driscoll contends that he is not attacking the premium rate itself, but rather the rate-review process by which the Commissioner approved the premium rate increase. Pet's Br. 18. According to Driscoll, this approach does not require the Court to reevaluate the reasonableness of his premium rate and, in turn, does not run afoul of the Filed Rate

¹⁵ Moreover, changing Driscoll's schedule form will not result in a change to his premium rate, because rates and forms are filed and approved separately. See RCW 48.19.030 (criteria for rates); RCW 48.19.040 (rate filings); RCW 48.18.100 (approval of forms). Driscoll's demand for a changed schedule form therefore seeks a measure of relief that could not and would not redress his alleged harm and, as such, is not justiciable. See *Wash. Educ. Ass'n*, 150 Wn.2d at 622-23.

Doctrine. *Id.* Driscoll’s argument fails for four reasons.

First, the Supreme Court in both *McCarthy* and *Tenore* held that the fundamental purpose behind the Filed Rate Doctrine is to “preserve the agency’s primary jurisdiction to *determine* the reasonableness of premium rates.” *McCarthy*, 182 Wn.2d at 942; *Tenore*, 136 Wn.2d at 331-32 (emphasis added). The Supreme Court’s use of the word “determine” signals that the rate-making process – *i.e.*, the process by which the OIC and Commissioner determine what rate an insurer may charge its insureds – falls under the Filed Rate Doctrine and is unassailable in the courts.¹⁶ *See Credit General Ins. Co.*, 82 Wn. App. at 627.

Second, *McCarthy* offered a test to help courts determine whether a claim runs afoul of the Filed Rate Doctrine:

In cases such as this that involve claims . . . related to agency-approved rates, courts must determine whether the claims . . . are merely incidental to agency-approved rates and therefore may be considered by courts or would necessarily require courts to *reevaluate agency-approved rates* and therefore may not be considered by courts.

¹⁶ As a related aside, even if we were to assume, *arguendo*, that the OIC failed to strictly follow its own procedural requirements in the setting of Driscoll’s rate, as Driscoll contends, that fact would not be sufficient to vest Driscoll with standing to challenge the rate. *Allan v. Univ. of Wash.*, 140 Wn.2d 323, 332 (2000) (“Standing under the [Administrative Procedures Act] is not conferred . . . merely on the basis of an asserted failure on the part of the agency to follow procedural requirements.”). In other words, even if this Court could reexamine the rate-making process (it cannot), Driscoll would still lack recourse because the violation he alleges – failure by the OIC to strictly follow its own rate-making procedures – is not a violation that could support a claim to change his rate.

. . . a court must be cautious not to substitute its judgment
on proper rate setting for that of the relevant agency[.]

McCarthy, 182 Wn.2d at 942 (*emphasis added*). Driscoll asks the Court to scrutinize the process undertaken by the OIC in granting MetLife’s request to increase his rate. Pet’s Br. 17. It is difficult to imagine a measure of relief that would more squarely require this Court to “reevaluate agency-approved rates” – *i.e.*, to review and to second guess (to “reevaluate”) whether the Commissioner’s approval of MetLife’s rate increase request was properly granted and, if not, whether the proceeding should be remanded for further action at the agency level. *Id.* The relief Driscoll proposes would require the Court to “substitute its judgment on *proper rate setting* [*i.e.*, the process by which the OIC sets rates] for that of the [OIC],” which is categorically prohibited by the Filed Rate Doctrine. *Id.* (*emphasis added*).

Third, despite purporting now to contend that he is challenging the rate-making process only but not the reasonableness of his actual rate, Driscoll has, from the very inception of this proceeding, *directly* challenged the reasonableness of his rate. [AR 278; CP 35]. It was only following his appellate loss, at which time Judge Clarke held that the Filed Rate Doctrine barred his claims, that Driscoll first attempted to recast his arguments in a way designed to attempt to avoid the doctrine. This Court

should see Driscoll’s arguments for what they truly are. In Count 3 of his Demand for Hearing, for example, Driscoll pleaded that information submitted by MetLife in support of the filed rate “does not show that the benefits scheduled in the changed Policy Schedule are *reasonable*” in relation to his new rate. [CP 33] (emphasis added). Similarly, Driscoll contends that the ongoing use of the approved rates “unfairly and inequitably profits MetLife.” [CP 34]. And, as discussed above, Driscoll even lobbies for the Court to remedy MetLife’s “unfounded rate increase request.” Pet’s Br. 20. The Court need not strain in reading between the lines to see that Driscoll is, in fact, asking the Court to reevaluate and remedy an allegedly unreasonable premium rate, which is prohibited.

Finally, courts around the country that have applied the Filed Rate Doctrine have consistently held that the doctrine not only protects the filed rate itself, but the process undertaken by the regulatory body to set the rate. *See, e.g., Carlin v. DairyAmerica, Inc.*, 688 F.3d 1117, 1129 (9th Cir. 2012) (“The third justification [for the filed rate doctrine] concerns the unnecessary interjection of the courts *into the rate-making process* where they have no expertise or valid reason to interfere.” (emphasis added and citation omitted)); *Miller v. Wells Fargo Bank, N.A.*, 994 F. Supp. 2d 542, 553-54 (S.D.N.Y. 2014) (“Importantly, the [filed rate] doctrine ‘applies even when a claim is based on fraud or impropriety *in*

the method by which the rate is determined.” (emphasis added and citation omitted)); *W. Park Assocs., Inc. v. Everest Nat’l Ins. Co.*, 975 N.Y.S.2d 445, 455 (N.Y. App. Div. 2013) (“The courts lack the expertise to determine whether *that method for calculating premiums* is unreasonable in light of the exclusion from coverage of liability associated with the work of uninsured subcontractors.” *emphasis added*). Though not binding on this Court, these decisions are persuasive authority regarding the scope of the Filed Rate Doctrine.

D. Driscoll Lacks A Private Right Of Action Under Any Of The Code Provisions That Govern The OIC’s Review And Approval Of Premium Rate Filings; He Has No Right To Seek To Enforce Code Provisions Under Which He Has No Private Right Of Action

Driscoll’s Application next fails because he seeks to invoke powers of enforcement that are vested in the Commissioner alone. Though he filed the Application pursuant to RCW 48.04.010 (which grants a limited right for an aggrieved person to seek a hearing), the Code sections Driscoll cites as the basis for his Application (*i.e.*, the Code sections undergirding his RCW 48.04.010 demand) confer no private right of action. Simply put, Driscoll demanded a hearing on regulations relating to the OIC’s rate-review and approval process, which are provisions he has no power to invoke or enforce.

Courts cannot create a private right of action where none exists. Instead, “[t]he judicial task is to interpret the statute [the legislature] has passed to determine whether it displays an intent to create not just a private right but also a private remedy.” *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979). The intent of the statute is singular in determining whether private rights exist. *See Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991); *Merrell Dow Pharm. v. Thompson*, 478 U.S. 804, 812 n.9 (1986) (collecting cases). Without clear indication that a statute intends to grant a private right of action, a cause of action does not exist and courts may not create one no matter how desirable the creation of a private right might seem as a policy matter. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145 (1985); *Lewis*, 444 U.S. at 23; *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001).

The central question is whether the statute at issue has “rights-creating language.” *Sandoval*, 532 U.S. at 288 (“To determine if a statute creates a private right of action, we look to the statutory section for ‘rights-creating’ language.”); *Brown ex rel. Brown v. Brown*, 157 Wn. App. 803, 813 (2010). “Rights-creating language” is language “explicitly confer[ing] a right directly on a class of persons that include[s] the plaintiff in [a] case.” *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 n.13 (1979).

Only one Code section relied upon by Driscoll contains “rights-creating language.” RCW 48.04.010 establishes the right to request a hearing within 90 days of a specific action, inaction, or order of the Commissioner. As discussed above, Driscoll failed to properly invoke that section.

The fundamental allegation in Count 3 of the Application is that the OIC failed to follow its own regulations regarding the submission of supporting documentation when it reviewed and approved MetLife’s rate filing. [AR 256-294, 248-250; CP 38]. In furtherance of this allegation, Driscoll seeks to rely in the Application on four statutes pertaining to highly technical issues like the grouping of policy forms, aggregation of claims experience, and loss ratio analysis used to support a rate increase request.¹⁷ None of these statutes contains “rights creating language” or confer any right of action on Driscoll or any other private citizen.

In all RCW sections relied upon by Driscoll as the bases for his RCW 48.04.010 challenge, the power of enforcement is expressly reserved to the Commissioner. In fact, the Commissioner reserves the *exclusive* right to enforce all provisions of the Code at RCW 48.02.080 (“(1) The commissioner may prosecute an action in any court of competent

¹⁷ RCW 48.18.100(1)-(4); RCW 48.18.110; RCW 48.19.030; and RCW 48.19.040 can be found in Appendix A.

jurisdiction to enforce any order made by him or her pursuant to any provision of this code.”). There is no such extension of enforcement powers to any class of private citizens. This is because the Code sections Driscoll seeks to invoke regulate insurers such as MetLife, not private citizens such as Driscoll. The OIC, as the state’s regulatory body, has the only right of enforcement.

E. MetLife Was Inappropriately Joined By Driscoll For The First Time On Appeal, Which Is Impermissible, And Driscoll Fails To Allege That MetLife Has Engaged In Any Wrongdoing Or Is Liable For Any Measure Of Relief

This proceeding fails as to MetLife for the additional reasons that (1) MetLife was improperly “joined” to the proceeding for the very first time on appeal; (2) Driscoll has not alleged that MetLife engaged in any wrongdoing or caused him any harm; and (3) Driscoll has not sought any measure of relief from MetLife.

1. MetLife Was Improperly Joined To This Proceeding For The Very First Time On Appeal And Must Therefore Be Dismissed From The Proceeding

Administrative actions exist so that private citizens have a forum in which to be heard if they feel they were aggrieved by an act *of the Commissioner*. RCW 48.04.010 (granting right to demand a hearing to person claiming to be aggrieved by an act *of the Commissioner*).

Administrative actions do not, by contrast, exist for the adjudication of disputes between private parties such as Driscoll and MetLife. *See Utter v. State, Dep't of Soc. & Health Servs.*, 140 Wn. App. 293, 299 (2007) (actions brought under the Administrative Procedure Act review decisions made by *agencies*); *see also* RCW 34.05.574(1). In fact, RCW 34.05.574, which sets forth all the measures of relief that a court sitting in a judicial review capacity may grant, allows the court to grant relief against the agency *only*. The Court may not grant relief against a private party, such as MetLife. *See* RCW 34.05.574(1) (same); *see also* RCW 34.05.570 (setting forth standards for judicial review related to agency action, not private action). That is what civil court actions are for. It would therefore have been inappropriate under any set of circumstances for Driscoll to name MetLife a party to his underlying agency action.

The error is compounded, however, by the fact that Driscoll “joined” MetLife for the very first time on appeal. It is axiomatic that new parties may not be joined on appeal. RCW 34.05.554 (“Issues not raised before the agency may not be raised on appeal.”); *see also Griffin v. Dep't of Soc. & Health Serv.*, 91 Wn.2d 616, 631 (1979); *Kitsap Cy. v. Dep't of Natural Res.*, 99 Wn.2d 386 (1983). MetLife was not a party to the agency action and cannot properly have been “joined” on appeal.

Even if Driscoll could have named MetLife a party to the agency action, Driscoll made a conscious decision not to do so, stating:

The suggestion that petitioner should be obliged to seek relief from the insurer for the failures of the OIC to perform duties imposed upon the OIC by law and that are alleged in the application is to suggest that petitioner is required to perform useless, unavailing acts.

[CP 61-62.] Driscoll's failure to name MetLife is "inexcusable neglect." "[I]nexcusable neglect exists when no reason for the initial failure to name the party appears in the record." *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 174 (1988). If the parties are apparent, or are ascertainable upon reasonable investigation, the failure to name them will be inexcusable. *Id.* For example, failure to name a party in an original complaint is inexcusable where the omitted party's identity is a matter of public record." *Id.*; *Tellinghuisen v. King Cnty. Council*, 103 Wn.2d 221, 224 (1984); *S. Hollywood Hills Citizens Ass'n v. King Cnty.*, 101 Wn.2d 68, 77-78 (1984); *Teller v. APM Terminals Pac., Ltd.*, 134 Wn. App. 696, 706-07 (2006). Here, Driscoll's conscious decision not to pursue relief from MetLife at any time prior to his first appeal constitutes "inexcusable neglect" and prevents MetLife from being "joined" at a later time.

2. Driscoll's Application Must Be Dismissed Because He Fails To Allege Any Wrongdoing By MetLife

Driscoll's Application also fails because he has not asserted any claim against MetLife, nor pleaded that MetLife engaged in any specific wrongdoing. Washington law requires that MetLife be dismissed from the proceeding where it is not alleged to have caused Driscoll harm. *Lang v. Burke*, 106 Wn. App. 1025 (2001) (a party "must at least identify the legal theories upon which the [party] is seeking recovery"); *Lewis v. Bell*, 45 Wn. App. 192, 197 (1986) ("[a] pleading is insufficient when it does not give opposing party fair notice of what the claim is and ground upon which it rests."); *see also* RCW 48.04.010 (only allowing a person to demand a hearing if aggrieved by a written order *of the commissioner*).

The crux of Count 3 is that the OIC inappropriately approved a premium rate increase based on insufficient actuarial information. Pet's Br. 17-18. Count 3, however, alleges no wrongdoing against MetLife. [AP 288-290; CP 17-18, 19-20]. Driscoll does not, for instance, claim that MetLife failed to provide appropriate information to the OIC in support of its rate filing; rather, Driscoll alleges only that *the OIC failed* to require MetLife to provide appropriate information in support of its filing. [AP 288-290; CP 17-18, 19-20] Driscoll's allegations of wrongdoing are directed to the OIC, not MetLife.

3. Driscoll’s Petition Must Be Dismissed As To MetLife Because Driscoll Fails To Seek Any Measure Of Relief Against MetLife

Relatedly, Driscoll’s petition must be dismissed as to MetLife because he fails to seek any measure of relief from MetLife. As discussed above, the relief Driscoll seeks at Count 3 of the Application is directed to the OIC. Indeed, Driscoll did not seek any relief from MetLife at the administrative level and has not done so in either appeal. *See* RCW 34.05.546(6)-(8) (requiring a person seeking appeal to demonstrate facts entitling him to judicial review; reasons why relief should be granted; *and a specific request for relief, including type and extent*) (emphasis added).

F. Driscoll’s Evidentiary Arguments Are Not Relevant To This Proceeding And Should Be Disregarded By The Court

Despite Driscoll’s Application having been dismissed on procedural grounds only, he attempts to argue the merits of his case. In particular, he contends that the January 16, 2015 declaration submitted by OIC actuary Scott Fitzgerald (the “Declaration”) in support of the OIC’s summary judgment motion somehow demonstrates that Driscoll’s allegations regarding the OIC’s purported failure to marshal and review appropriate information in support of MetLife’s rate filing are meritorious. Pet’s Br. 14-15. Curiously, Driscoll asks *this Court* to make new findings of fact – a task that, were it even appropriate in this proceeding at all,

would be reserved to the Presiding Officer on remand. *Id.*; *see also* RCW 34.05.558 (titled “judicial review of facts confined to record”). At bottom, the factual issues Driscoll attempts to raise were not relevant to the proceedings below and are not relevant now. Driscoll’s evidentiary arguments fail for three reasons.

First, Driscoll argues that the Declaration somehow proves that the OIC ran afoul of RCW 48.19.030(3)(a), and RCW 48.19.040(1) and (2), during its rate review process.¹⁸ Pet’s Br. 21-22. As discussed in this Brief at Section IV.D, *supra*, these statutes contain no “rights-creating language” under which Driscoll, a private citizen, has any right of action or enforcement. Accordingly, all powers of enforcement are reserved to the Commissioner. RCW 48.02.080.

Second, Driscoll’s attempt to argue the merits of the Declaration fails because Presiding Officer Finkle made no findings of fact or conclusions of law based on the Declaration. [CP 24-29]. Presiding Officer Finkle awarded summary judgment to the OIC because Driscoll’s Application was time-barred. [CP 28-29]. He never reached the merits of the case (including the Declaration). Similarly, on appeal, Judge Clarke affirmed, holding that the proceeding is time-barred and prohibited by the Filed Rate Doctrine. [CP 70-71]. Judge Clarke never reached the merits

¹⁸ These statutes can be found in Appendix A.

or Declaration. The Declaration is not relevant to the procedural arguments undergirding the OIC's summary judgment victory. Driscoll is not within his rights now to ask this Court to make factual determinations on issues that were neither raised and decided nor material to the outcome of the proceedings below. [CP 28-29, 70-71].

Finally, even if the Court did somehow reach the merits of Driscoll's evidentiary arguments, those arguments would still fail. The Declaration does not support Driscoll's position. In fact, quite the opposite is true. Driscoll disingenuously latches onto a single soundbite in the January 16, 2015 Declaration where Mr. Fitzpatrick states: "Washington specific rates were not filed with the rate filing." Pet's Br. 22; [AR 051-054]. He contends that this sentence fragment, taken in isolation, is at odds with his reading of RCW 48.19.030(3)(a). The trouble with Driscoll's soundbite is that Mr. Fitzpatrick then dedicates the next five-and-a-half paragraphs of his January 16, 2015 Declaration to explaining, in explicit detail, that: (1) using Washington rates alone would be "statistically inaccurate and misleading;" (2) there were few policies sold in Washington (just 55), which is not a statistically significant sample size to accurately analyze loss ratios; (3) actuaries use the Bayesian Credibility Theory to review loss ratios, which requires a sample size of at least 1,082 open claims (*i.e.*, nearly 20 times the *total* number of

policies ever sold in Washington) to provide statistically credible results; (4) it was necessary to review nationwide claims experience to generate statistically credible results; and (5) MetLife's rate filing was "no different in form or substance than any other typical rate filing" and the rate filing "was accurately determined to be supported by the calculations." [AR 051-054]. Moreover, RCW 48.19.030(3)(a) specifically permits insurers to rely on experience from states outside of Washington. And, the January 16, 2015 Declaration is totally uncontroverted by any record evidence.¹⁹ Thus, even if the Court reached the merits of Driscoll's evidentiary arguments, he could not prevail. *See Chandler*, 141 Wn. App. at 647-48.

G. Driscoll Has No Legal Basis To Demand Fees And Costs; His Demand Should Therefore Be Denied

Driscoll includes a demand for statutory fees and costs against MetLife and the OIC. Pet's Br. 30-31. Under Washington law, "[a]ttorney fees may be awarded only if authorized by contract, statute, or a recognized ground in equity." *Schmidt v. Coogan*, 181 Wn.2d 661, 679

¹⁹ Presiding Officer Finkle determined that the affidavits submitted by Driscoll in opposition to Mr. Fitzpatrick's declarations [AR 051-054, 242-245] were "argumentative, speculative and/or not based on personal knowledge or reasonable inferences, as required by CR 56(e) and ER 602, nor do they constitute insurance or other expert testimony under ER 702, so [they] are disregarded." [CP 26-27]; *Hilltop Terrace Homeowner's Ass'n v. Island Cty.*, 126 Wn.2d 22, 34 (1995) (explaining that an appellate court applies the "substantial evidence" standard to an agency's findings of fact and affords those findings substantial deference when based on matters that are complex and technical). Put simply, Mr. Fitzpatrick's Declaration *is* evidence and Driscoll's responding affidavits *are not* evidence, meaning Mr. Fitzpatrick's Declaration is uncontroverted.

(2014) (citation and internal quotation marks omitted). No such basis exists here and Driscoll's demand should be rejected by this Court.

First, as discussed above, MetLife is not even a proper party to this proceeding. This is the second appeal of an administrative action. Administrative actions exist to resolve disputes between private citizens and agencies, not private citizens and insurers. *See* Section IV.E, *infra*. MetLife cannot, as a matter of law, be a named party to the proceeding between Driscoll and the OIC. As such, there is absolutely no legal basis for Driscoll to contend that an award of fees and/or costs against MetLife is appropriate.

Second, even if this Court did reach the merits of Driscoll's fee/cost demand, the demand should be rejected under settled Washington law. Driscoll demands fees and costs under RCW 34.05.566(5), which allows the court to "tax the cost of preparing transcripts and copies of the record: (a) Against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record[.]" RCW 34.05.566 is limited to the recovery of *costs*; it does not provide for the recovery of *fees*. As to costs, there is no basis for a finding that MetLife "unreasonably refuse[d] to stipulate to shorten, summarize, or organize the record." As discussed, MetLife did not become a "party" to this proceeding until the appellate

stage. MetLife therefore played no role in the development of the record at the agency level or the transmission of the record to the Superior Court.

Next, Driscoll demands fees and costs under RCW 4.08. Nowhere does Chapter 4.08, titled “parties to actions,” provide a basis for an award of fees or costs in this proceeding.

Lastly, Driscoll demands fees and costs under RCW 4.84.340, .350, and .360. RCW 4.84.350(1) states that “a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys’ fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust.” Driscoll makes no showing at all that the Commissioner’s action was not “substantially justified,” which means “justified to a degree that would satisfy a reasonable person”—*i.e.*, “it had a reasonable basis in law and in fact.” *Brown v. Dep’t of Soc. & Health Servs.*, 190 Wn. App. 572, 597-98 (2015) (citations omitted). Importantly, the Commissioner’s action “need not be correct, only reasonable.” *Id.* The Commissioner was reasonable in finding that Driscoll’s demand for a hearing was time-barred under the 90-day filing

requirement, as evidenced by the fact that Judge Clarke affirmed the Commissioner's ruling on judicial review.²⁰

Moreover, we are left to wonder what fees Driscoll possibly thinks he is entitled to recover. Though a retired attorney, Driscoll has handled this proceeding *pro se* from its inception. He points to no evidence and, in fact, does not even contend that he retained counsel to handle this proceeding or, more importantly, that he actually paid any sum of money to any attorney. Unlike MetLife, which has been forced to expend many thousands of dollars defending a proceeding to which it cannot and should not have even been "joined," Driscoll has ostensibly spent nothing and is seeking a windfall now. MetLife takes the proverbial "high road" by not cross-moving at this time for an award of fees and costs against Driscoll, though such an award would likely be warranted given MetLife's inappropriate and untimely "joinder" to the proceeding, which Driscoll, a 40-year legal practitioner, surely knows to be impermissible.

V. CONCLUSION

MetLife respectfully asks that this Court affirm the Presiding Officer and Court below and hold, on such grounds as it deems

²⁰ More to the point, the ability to seek fees relates to an examination of whether determinations of *the Commissioner* are "substantially justified." MetLife, of course, is not the Commissioner. So Driscoll's statutory basis for seeking fees is totally inapplicable to MetLife.

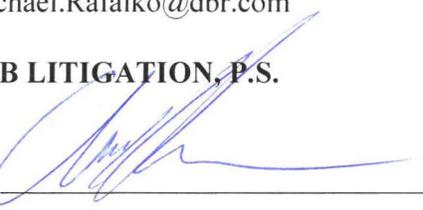
appropriate, that Driscoll's Application was properly disposed of at the administrative level. In addition, MetLife asks that it be dismissed as a "named party" to the proceeding because MetLife cannot act as a defendant/respondent in an administrative proceeding and, even if it could act in such a capacity, MetLife was improperly "joined" to the proceeding. Relatedly, MetLife asks that, if and when it is dismissed as a "named party" to the proceeding, it be allowed to remain in the proceeding in an *amicus* or else "interested party" capacity, because the final outcome of the proceeding potentially affects MetLife's rights and obligations with respect to Driscoll and other Washington insureds.

Respectfully submitted this 16th day of November, 2016.

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KSB LITIGATION, P.S.

By: 

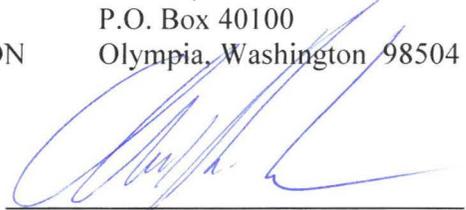
William C. Schroeder, WSBA #41986
Attorneys for Respondents MetLife and
TIAA-CREF

VI. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of November 2016, I caused to be served a true and correct copy of the foregoing document to the following:

<u> </u>	HAND DELIVER	Leo J. Driscoll
<u>X</u>	U.S. MAIL	4511 E. North Glenngrae Ln.
<u> </u>	OVERNIGHT MAIL	Spokane, Washington 99223
<u> </u>	FAX TRANSMISSION	

<u> </u>	HAND DELIVER	Isaac Burton Williamson
<u>X</u>	U.S. MAIL	Attorney General's Office
<u> </u>	OVERNIGHT MAIL	P.O. Box 40100
<u> </u>	FAX TRANSMISSION	Olympia, Washington 98504



William C. Schroeder

VII. APPENDICES

1

RCW 48.18.100. Forms of policies--Filing, certification, and approval—Exceptions

(1) No insurance policy form or application form where written application is required and is to be attached to the policy, or printed life or disability rider or endorsement form may be issued, delivered, or used unless it has been filed with and approved by the commissioner. This section does not apply to:

- (a) Surety bond forms;
- (b) Forms filed under RCW 48.18.103;
- (c) Forms exempted from filing requirements by the commissioner under RCW 48.18.103;
- (d) Manuscript policies, riders, or endorsements of unique character designed for and used with relation to insurance upon a particular subject;
- (e) Contracts of insurance procured under the provisions of chapter 48.15 RCW; or
- (f) Forms filed under the requirements of RCW 48.43.733.

(2) Every such filing containing a certification, in a form approved by the commissioner, by either the chief executive officer of the insurer or by an actuary who is a member of the American academy of actuaries, attesting that the filing complies with Title 48 RCW and Title 284 of the Washington Administrative Code, may be used by the insurer immediately after filing with the commissioner. The commissioner may order an insurer to cease using a certified form upon the grounds set forth in RCW 48.18.110. This subsection does not apply to certain types of policy forms designated by the commissioner by rule.

(3) Except as provided in RCW 48.18.103 and 48.43.733, every filing that does not contain a certification pursuant to subsection (2) of this section must be made not less than thirty days in advance of issuance, delivery, or use. At the expiration of the thirty days, the filed form shall be deemed approved unless prior thereto it has been affirmatively approved or disapproved by order of the commissioner. The commissioner may extend by not more than an additional fifteen days the period within which he or she may affirmatively approve or disapprove any form, by giving notice of the extension before expiration of the initial thirty-day period. At the expiration of the period that has been extended, and in the absence of prior affirmative approval or disapproval, the form shall be deemed approved. The commissioner may withdraw any approval at any time for cause. By approval of any form for immediate use, the commissioner may waive any unexpired portion of the initial thirty-day waiting period.

(4) The commissioner's order disapproving any form or withdrawing a previous approval must state the grounds for disapproval.

(5) No form may knowingly be issued or delivered as to which the commissioner's approval does not then exist.

(6) The commissioner may, by rule, exempt from the requirements of this section any class or type of insurance policy forms if filing and approval is not desirable or necessary for the protection of the public.

(7) Every member or subscriber to a rating organization must adhere to the form filings made on its behalf by the organization. Deviations from the organization are permitted only when filed with the commissioner in accordance with this chapter.

(8) Medical malpractice insurance form filings are subject to the provisions of this section.

(9) Variable contract forms; disability insurance policy forms; individual life insurance policy forms; life insurance policy illustration forms; industrial life insurance contract, individual medicare supplement insurance policy, and long-term care insurance policy forms, which are amended solely to comply with the changes in nomenclature required by RCW 48.18A.035, 48.20.013, 48.20.042, 48.20.072, 48.23.380, 48.23A.040, 48.23A.070, 48.25.140, 48.66.120, and 48.76.090 are exempt from this section.

RCW 48.18.110. Grounds for disapproval

(1) The commissioner shall disapprove any such form of policy, application, rider, or endorsement, or withdraw any previous approval thereof, only:

(a) If it is in any respect in violation of or does not comply with this code or any applicable order or regulation of the commissioner issued pursuant to the code; or

(b) If it does not comply with any controlling filing theretofore made and approved; or

(c) If it contains or incorporates by reference any inconsistent, ambiguous or misleading clauses, or exceptions and conditions which unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the contract; or

(d) If it has any title, heading, or other indication of its provisions which is misleading; or

(e) If purchase of insurance thereunder is being solicited by deceptive advertising.

(2) In addition to the grounds for disapproval of any such form as provided in subsection (1) of this section, the commissioner may disapprove any form of disability insurance policy if the benefits provided therein are unreasonable in relation to the premium charged. Rates, or any modification of rates effective on or after July 1, 2008, for individual health benefit plans may not be used until sixty days after they are filed with the commissioner. If the commissioner does not disapprove a rate filing within sixty days after the insurer has filed the documents required in RCW 48.20.025(2) and any rules adopted pursuant thereto, the filing shall be deemed approved.

RCW 48.19.030. Making of rates—Criteria

Rates shall be used, subject to the other provisions of this chapter, only if made in accordance with the following provisions:

(1) In the case of insurances under standard fire policies and that part of marine and transportation insurances not exempted under RCW 48.19.010, manual, minimum, class or classification rates, rating schedules or rating plans, shall be made and adopted; except as to specific rates on inland marine risks individually rated, which risks are not reasonably susceptible to manual or schedule rating, and which risks by general custom of the business are not written according to manual rates or rating plans.

(2) In the case of casualty and surety insurances:

(a) The systems of expense provisions included in the rates for use by any insurer or group of insurers may differ from those of other insurers or groups of insurers to reflect the requirements of the operating methods of any such insurer or group with respect to any kind of insurance, or with respect to any subdivision or combination thereof for which subdivision or combination separate expense provisions are applicable.

(b) Risks may be grouped by classifications for the establishment of rates and minimum premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans which establish standards for measuring variations in hazards or expense provisions, or both. Such standards may measure any differences among risks that can be demonstrated to have a probable effect upon losses or expenses.

(3) Due consideration in making rates for all insurances shall be given to:

(a) Past and prospective loss experience within this state for experience periods acceptable to the commissioner. If the information is not available or is not statistically credible, an insurer may use loss experience in those states which are likely to produce loss experience similar to that in this state.

(b) Conflagration and catastrophe hazards, where present.

(c) A reasonable margin for underwriting profit and contingencies.

(d) Dividends, savings and unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers.

(e) Past and prospective operating expenses.

(f) Past and prospective investment income.

(g) All other relevant factors within and outside this state.

(4) In addition to other factors required by this section, rates filed by an insurer on its own behalf may also be related to the insurer's plan of operation and plan of risk classification.

(5) Except to the extent necessary to comply with RCW 48.19.020 uniformity among insurers in any matter within the scope of this section is neither required nor prohibited.

RCW 48.19.040. Filing required--Contents—Definition

(1) Every insurer or rating organization shall, before using, file with the commissioner every classifications manual, manual of rules and rates, rating plan, rating schedule, minimum rate, class rate, and rating rule, and every modification of any of the foregoing which it proposes. The insurer need not so file any rate on individually rated risks as described in subdivision (1) of RCW 48.19.030; except that any such specific rate made by a rating organization shall be filed.

(2) Every such filing shall indicate the type and extent of the coverage contemplated and must be accompanied by sufficient information to permit the commissioner to determine whether it meets the requirements of this chapter. An insurer or rating organization shall offer in support of any filing:

(a) The experience or judgment of the insurer or rating organization making the filing;

(b) An exhibit detailing the major elements of operating expense for the types of insurance affected by the filing;

(c) An explanation of how investment income has been taken into account in the proposed rates; and

(d) Any other information which the insurer or rating organization deems relevant.

(3) If an insurer has insufficient loss experience to support its proposed rates, it may submit:

(a) Loss experience for similar exposures of other insurers or of a rating organization; or

(b) A complete and logical explanation of how it has developed its proposed rates, including the insurer's analysis of any relevant information and showing why the proposed rates should be considered to meet the requirements of RCW 48.19.020.

(4) Every such filing shall state its proposed effective date.

(5)

(a) A filing made pursuant to this chapter shall be exempt from the provisions of RCW 48.02.120(3). However, the filing and all supporting information accompanying it shall be open to public inspection only after the filing becomes effective, except as provided in (b) of this subsection.

(b) For the purpose of this section, “usage-based insurance” means private passenger automobile coverage that uses data gathered from any recording device as defined in RCW 46.35.010, or a system, or business method that records and preserves data arising from the actual usage of a motor vehicle to determine rates or premiums. Information in a filing of usage-based insurance about the usage-based component of the rate is confidential and must be withheld from public inspection.

(6) Where a filing is required no insurer shall make or issue an insurance contract or policy except in accordance with its filing then in effect, except as is provided by RCW 48.19.090.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

LEO J. DRISCOLL,)
)
Petitioner,)
)
vs.) Cause No. 15-2-00920-1
)
WASHINGTON STATE INSURANCE))
COMMISSIONER, et al.,)
)
Respondents.)

VERBATIM REPORT OF PROCEEDINGS
(Court's Oral Decision)

BE IT REMEMBERED that on the 28th day of
August, 2015, the above-entitled cause came on for hearing
before the Honorable HAROLD D. CLARKE, III, Judge,
Department No. 8, Spokane County Superior Court.

Joe Wittstock, RPR - Official Court Reporter
Spokane County Superior Court, Spokane, Washington 1

Exhibit 1 (located in Appendix B)

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A P P E A R A N C E S

FOR THE PETITIONER: LEO J. DRISCOLL, ESQ.
4511 East North Gleengrae Lane
Spokane, Washington 99223

FOR THE COMMISSIONER: ISAAC WILLIAMSON, ESQ.
Post Office Box 40100
1125 Washington Street SE
Olympia, Washington 98504

FOR METROPOLITAN
INSURANCE and TIAA
CREF: MICHAEL D. RAFALKO, ESQ.
VISHAL H. SHAH, ESQ.
Suite 2000
One Logan Square
Philadelphia, Pennsylvania 19103

WILLIAM SCHROEDER, ESQ.
Sprague Avenue
Washington Trust Building
Spokane, Washington 99201

1 AFTERNOON SESSION

2 (August 28, 2015; 3:25 p.m.)

3
4 THE COURT: Thank you.

5 MR. RAFALKO: That is all, Your Honor.

6 THE COURT: Okay. Well, first of all, I appreciate
7 the interesting issue. I didn't mean to imply that I
8 thought the 41 percent was unreasonable. My horror story
9 was simply to illustrate that when things happen all at
10 once, sometimes we jump up and think that seems
11 unreasonable. Quite frankly to me, a three-percent rate
12 increase a year as a practical matter doesn't seem
13 unreasonable. Whether it's legally unreasonable, whether
14 it's sustainable, whether it's appropriate, I obviously
15 can't comment.

16 My point is that most things seem to go up by three or
17 four percent a year no matter what we do. That was the
18 point. It had nothing to do with the merits of the case.

19 I just suspect that it got everyone's attention when
20 they got a 41 percent rate increase. But in fact if they
21 averaged it out over the life of the policy to-date, it
22 probably doesn't seem quite so onerous.

23 That is not Mr. Driscoll's point, and I get that. I
24 think I get his point, or the main thrust, which is the
25 process that he has observed through the paperwork does not

Joe Wittstock, RPR - Official Court Reporter
Spokane County Superior Court, Spokane, Washington 3

Exhibit 1 (located in Appendix B)

1 appear to him to match the statutory mandates. Fair
2 enough. And he has raised that issue with the state. And
3 the state has said, okay, here is our response. And Met
4 Life has come in and said, here's our response based on our
5 position in the case, which obviously is much more of an
6 interested party than a true litigation party, whatever
7 that is.

8 First of all, there has to be some -- there just has
9 to be some finality to these OIC decisions. I think the
10 statute does apply. It doesn't make any sense for me to
11 believe that it doesn't. And of course the statute I'm
12 referring to is the 4804 statute. I think that is why it
13 is there. I mean, otherwise it doesn't seem to have a lot
14 of reason to be hanging around.

15 4804 deals with hearings and appeals. Of course it
16 says the commissioner may hold a hearing. I don't quite
17 know what all that means. I'm sure the WACs define that.
18 But basically it is telling the rest of us out there in the
19 world that if we think there is an issue going on with OIC,
20 or something else with this process, this is what we do, is
21 we look to 4804. That is my sense of it.

22 I could be wrong. I could be right. I have had no
23 idea. It is just that my sense of it, is that is the
24 reason for this particular part of the statute.

25 Clearly the state legislature could have buried in

Joe Wittstock, RPR - Official Court Reporter
Spokane County Superior Court, Spokane, Washington 4

Exhibit 1 (located in Appendix B)

1 each one of those subsections of insurance a hearings and
2 appeal procedure, and then we'd have to turn to every one
3 of these things; group life and annuities under 4023,
4 casualty under 4822, and on and on. But they didn't choose
5 to do it that way. They simply said, here it is; gives you
6 time line. You either meet the time line or you don't.

7 I don't think it was met. And clearly in terms of due
8 process, I think it is pretty awkward for OIC to say, well,
9 if the rate gets set, the notice go out, some two years
10 later we get an appeal -- that is I say awkward -- but it's
11 difficult legally I think then to unwind that transaction
12 and start all over.

13 In any event, what I think about that again is kind of
14 irrelevant. It is the question of, do I believe that Judge
15 Finkle's order is correct that 4804 applies. I do.

16 I asked the state -- and I probably should have asked
17 the question of everyone -- I didn't understand paragraph
18 -- which is why I searched -- I didn't understand Paragraph
19 13 of the judge's order, Judge Finkle's order, to
20 necessarily say that Met Life did something correct or
21 incorrect. I think what he was trying to indicate was that
22 it was a time line, so he cites June 10, 2011. And the
23 time line is only important because it triggers the
24 ultimate 4804 time line for filing an appeal. It says it
25 is supported by actuarial other required information.

Joe Wittstock, RPR - Official Court Reporter
Spokane County Superior Court, Spokane, Washington 5

Exhibit 1 (located in Appendix B)

1 I didn't understand him to make any kind of a
2 conclusory statement that he thought it was appropriately
3 or inappropriately supported. I didn't even understand his
4 order to go there.

5 When we go there, I might say -- Mr. Rafalko talks
6 about getting into the weeds -- it gets pretty dense to get
7 into the rate process. I think unless you do this work
8 every week, it's pretty difficult to wade through how those
9 rates are necessarily set. Again, that is not the issue.

10 I certainly appreciate Mr. Driscoll's point that in
11 fact, you know, it has to be done right. Well, I think the
12 appeal has to be done correctly. I think both sides have
13 to be done correctly.

14 Now as to the Filed Rate Doctrine, this gets to be
15 very interesting. This was a unanimous opinion that came
16 out of the Supreme Court in April.

17 I was going to make some comment about a unanimous
18 opinion, but I will just get in trouble.

19 But, it's nice. We don't have a five/four split here.
20 We don't have misdirection. We don't have three opinions.
21 We don't have a plurality. We have a nine-to-nothing
22 opinion which says, "Consumers power to challenge
23 agency-approved rates is limited by the common law Filed
24 Rate Doctrine." And then it goes on -- the court, excuse
25 me -- goes on to say -- and this is at Page 6 of the

Joe Wittstock, RPR - Official Court Reporter
Spokane County Superior Court, Spokane, Washington 6

Exhibit 1 (located in Appendix B)

1 opinion -- "in cases such as this that involve claims and
2 damages related to agency-approved rates, courts must
3 determine whether the claims and damages are merely
4 incidental," the agency-approved rates, "and therefore may
5 be considered by courts, or would necessarily require
6 courts to re-evaluate agency-approved rates, and therefore
7 may not be considered by the courts."

8 Now, I appreciate the distinction is I am not being
9 asked to set a rate, or say this ultimate rate that was
10 approved at 41 percent is good or bad.

11 What I am be asking by Mr. Driscoll to do is to send
12 it back, remand, and ask OIC to do that. But in order to
13 do that, I have to make some determination that the process
14 was flawed.

15 My sense is that the rate -- excuse me -- my sense is
16 that the process is inherent in the rate. Just like a jury
17 verdict, the deliberations are inherent in the verdict. We
18 don't pull that apart unless obviously there is some really
19 unique set of circumstances.

20 And the court goes on to even talk about fraud or
21 misrepresentation.

22 I suppose if you could show that -- just to use an
23 example -- some official was bribed within OIC to pass this
24 through, you could challenge that -- probably by a
25 different route -- but that wouldn't be barred by the Filed

Joe Wittstock, RPR - Official Court Reporter
Spokane County Superior Court, Spokane, Washington 7

Exhibit I (located in Appendix B)

1 Rate Doctrine.

2 There is no indication that the agency did anything
3 but act. Whether they acted internally correct or not, but
4 they acted within their processes and got information, and
5 ultimately reached a decision.

6 I think this Filed Rate Doctrine does come into play.
7 I think the rate is inherent -- excuse me -- the process is
8 inherent to the rate. Otherwise, we're really parsing
9 words. And otherwise, every claim is going to be, well,
10 it's the process, judge, it's not the rate. And I think
11 the doctrine would just disappear. And any lawyer worth
12 their salt would pick up on that distinction in about a
13 minute, and we would be done. And I don't think that is
14 the way the court sees it.

15 So I'm going to sustain Judge Finkle's ruling on the
16 time line to file. I think his ruling is correct.

17 And to the extent this goes anywhere and is before
18 another court, I'm going to rule that even if the time line
19 is somehow opened up and it just sort of floats a little
20 bit -- and the suggestion is that it is within the
21 three-year statute of limitation -- then it seems so me the
22 Filed Rate Doctrine does apply in the case because the
23 challenge is to the rate and process that brought us there,
24 it is not to some other claim that is filed.

25 And as correctly pointed out, this isn't a contract

Joe Wittstock, RPR - Official Court Reporter
Spokane County Superior Court, Spokane, Washington 8

Exhibit I (located in Appendix B)

1 claim between Mr. Driscoll and Met Life. Mr. Driscoll
2 acknowledges that. He acknowledges the contract says what
3 it says, and then correctly points me to the fact that all
4 contracts have certain things inherent in them, including a
5 duty of good-faith dealing.

6 I certainly don't see anything here that would
7 indicate that that wasn't followed. I don't need to go
8 there; I'm not making such a finding.

9 So on those two grounds today, I will sustain the
10 lower court's -- or excuse me -- the lower tribunal's
11 determination and order.

12 I'll need orders. And I'm confident you will
13 circulate them between all of you. If you can't agree upon
14 the orders, that is certainly fine. If there is a
15 disagreement, you need to contact my judicial assistant and
16 set a hearing, and we can handle the hearing.

17 And for counsel that -- and I know you obviously are
18 not from the area -- we can always do hearings by phone,
19 and that includes Mr. Williamson as well, obviously. I
20 know you are from the other side the state. So if it is a
21 presentment hearing and we're only going to argue about
22 language, I would suggest you might want to handle it by
23 phone. But that is obviously your choice, not mine. But
24 you are welcome to do it by phone.

25 Counsel, and Mr. Driscoll, I appreciate your time.

Joe Wittstock, RPR - Official Court Reporter
Spokane County Superior Court, Spokane, Washington 9

Exhibit 1 (located in Appendix B)

1 Again, as I said, this was a very interesting issue; well
2 presented. I really appreciated the arguments and the
3 briefing. It was kind of a peek into a different world
4 that most of us don't do.

5 If you all don't mind, I'm going to step off the
6 bench. I just need to stretch. I have got another matter.
7 When you are ready to clear, if you will clear the table,
8 and then I will get the other folks up. Thank you.

9 THE CLERK: Please rise.

10 MR. RAFALKO: Thank you, Your Honor.

11 THE CLERK: Court is in recess.

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13 (Matter adjourned at 3:35 p.m.)

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Joe Wittstock, RPR - Official Court Reporter
Spokane County Superior Court, Spokane, Washington 10

Exhibit 1 (located in Appendix B)

1 STATE OF WASHINGTON)

2 : ss: REPORTER'S CERTIFICATE

3 COUNTY OF SPOKANE)

4 I, Kenneth J. Wittstock, a notary
5 public in and for the State of Washington, do hereby
6 certify:

7 That I am an Official Court Reporter
8 for Spokane County Superior Court, Department No. 8,
9 at Spokane, Washington;

10 That the foregoing hearing was taken
11 on the date and at the time and place as shown on Page 1
12 hereto;

13 That the foregoing is a true and
14 correct transcription of my shorthand notes of the
15 requested hearing transcribed by me or under my
16 direction;

17 WITNESS my hand and seal this
18 7TH day of November, 2015.

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KENNETH J. WITTSTOCK,
CSR No. WI-TT-SK-J409NK
Notary Public in and for the
State of Washington, residing
at Spokane.
My commission expires 4-22-16.

Joe Wittstock, RPR - Official Court Reporter
Spokane County Superior Court, Spokane, Washington 11

Exhibit 1 (located in Appendix B)

BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

FILED

2016 JUN 15 A 11: 22

In the Matter of:

LEO J. DRISCOLL,

Applicant.

Docket No. 16-0002

HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER

**ORDER ON CROSS MOTIONS FOR
SUMMARY JUDGMENT**

TO: Leo J. Driscoll
4511 E. North Glenngrae Lane
Spokane, WA 99223

COPY TO: Mike Kreidler, Insurance Commissioner
James T. Odiorne, J.D., CPA, Chief Deputy Insurance Commissioner
Doug Hartz, Deputy Commissioner, Company Supervision Division
Molly Nollette, Deputy Commissioner, Rates and Forms Division
AnnaLisa Gellermann, Deputy Commissioner, Legal Affairs Division
Mandy Weeks Insurance Enforcement Specialist, Legal Affairs Division
Office of the Insurance Commissioner
PO Box 40255
Olympia, WA 98504-0255

This case comes before me on Leo J. Driscoll's ("Driscoll's") and the Office of Insurance Commissioner's ("OIC's") Cross Motions for Summary Judgment.

I have considered the Motions filed April 29, 2016; the OIC's Response to Driscoll's Motion, filed May 13, 2016; Driscoll's Response to the OIC's Motion, filed May 13, 2016; the OIC's Reply in Support of its Motion, filed May 20, 2016; Driscoll's Reply in Support of his Motion, filed May 20, 2016; and the declarations and other attachments to such submissions.

Issue.

In briefing in support of their Motions, among other things, the parties present the following issues:

1. Is Driscoll a person “aggrieved” for purposes of RCW 48.04.010(1)(b), such that he has standing to demand a hearing before the OIC Hearings Unit. **Short Answer: No.**
2. Is Driscoll’s demand for hearing barred by the “filed rate” doctrine? **Short Answer: Yes.**
3. Does the Consumer Protection Act, RCW Ch. 19.86, provide an avenue for Driscoll to challenge the actions of his insurer? **Short Answer: Yes.**

Given these answers, and for the reasons outlined below, I grant summary judgment in favor of the OIC.

Background.

In a previous administrative matter before the OIC, Docket No. 14-0187, involving claims by Driscoll also challenging a prior increase in premiums of long-term care insurance (“LTCI”) that TIAA-CREF Life Insurance Company (“T-C Life”) issued to Driscoll, my predecessor expressed reservations in dicta about the standing Driscoll had to demand a hearing before the OIC’s Hearings Unit, stating in part at page 4 of “Order on OIC Staff’s Motion for Summary Judgment” (“Order”), issued January 23, 2015, which granted the OIC’s motion for summary judgment, the following:

9. RCW 48.04.010(1) provides that the insurance commissioner (who has properly delegated this function to me) shall hold a hearing upon written demand made by any person aggrieved by any act, threatened act, or failure of the commissioner to act, specifying in what respects such person is aggrieved and the grounds relied upon for the relief demanded. I assume for purposes of this Order, without deciding, that the Driscolls were aggrieved by an act or failure to act of the commissioner (though a serious standing issue exists) and further assume that the Demand appropriately specifies how they were aggrieved and the basis for relief.

(Emphasis added).

Driscoll subsequently petitioned for judicial review of the Order. On November 25, 2015, Hon. Harold D. Clarke, III, of Spokane County Superior Court, in Cause No. 15-2-00920-1,

entered an order affirming the Order (OIC Exhibit 12), stating:

1. [Driscolls'] claims are each time-barred under RCW 48.04.010(3);
2. [Driscolls'] claims are barred by the Filed Rate Doctrine in that they seek to challenge the premium rate filed with and approved by the Washington Office of the Insurance Commissioner ("OIC") and the process by which the OIC reviewed and approved the rates charged to [the Driscolls], both of which are impermissible. See *McCarthy v. Premera*, 347 P.3d 872, 182 Wn. 936 (Wn. 2015); and

Because the Court has determined that Petitioners' claims are barred by RCW 48.04.010(3) and the Filed Rate Doctrine, it did not reach the parties' remaining arguments.

The Court ORDERS that the [Order], and the order denying reconsideration, entered on February 10, 2015, are AFFIRMED in their entirety.

(Brackets added).

On January 4, 2016, Driscoll filed a demand for hearing ("Demand") in the instant matter with the OIC's Hearings Unit stating in part:

The undersigned applicant [Driscoll] hereby applies to the Insurance Commissioner for an adjudicative proceeding and demands a hearing before the Insurance Commissioner to consider and adjudicate this challenge to action [*effectively an "order" as defined by RCW 34.05.010(11)*] of the . . . OIC . . . that authorized and/or approved an unfounded request for a 22.69% rate increase in the premiums of long-term care insurance ("LTCI") series LTC.04 policy forms issued to [Driscoll] and to [Driscoll's] spouse. . . . [Driscoll] is a person aggrieved by such action (order) in particulars hereinafter set forth. RCW 48.04.010(1)(b) requires the Commissioner to hold the requested hearing.

(Brackets added).

Summary Judgment Standard.

WAC 10-08-135, which governs motions for summary judgment in administrative proceedings, provides:

A motion for summary judgment may be granted and an order issued if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In ruling on a motion for summary judgment, the court must consider the material evidence and all reasonable inferences therefrom most favorably for the nonmoving party and, when so considered, if reasonable people might reach different conclusions, the motion should be denied. *Jacobsen v. State*, 89 Wn.2d 104, 108-109, 569 P.2d 1152 (1977). See also *Fleming v. Stoddard Wendle Motor Co.*, 70 Wn.2d 465, 467, 423 P.2d 926 (1967).

Since both the OIC and Driscoll are each the nonmoving party when considering the other's Cross Motion for Summary Judgment, I will consider material evidence in the record in the manner most favorable to the nonmoving party in each instance. If reasonable persons might reach different conclusions given the evidence, then I should deny the Cross Motions of either or both the OIC and Driscoll.

A. Whether Driscoll has standing to file the Demand.

RCW 48.04.010 mandates that the Commissioner hold hearings under certain circumstances, and specifies the contents an aggrieved party must include in their demand for hearing:

(1) . . . The commissioner shall hold a hearing:

(a) If required by any provision of this code; or

(b) Except under RCW 48.13.475, upon written demand for a hearing made by any person aggrieved by any act, threatened act, or failure of the commissioner to act, if such failure is deemed an act under any provision of this code, or by any report, promulgation, or order of the commissioner other than an order on a hearing of which such person was given actual notice or at which such person appeared as a party, or order pursuant to the order on such hearing.

(2) Any such demand for a hearing shall specify in what respects such person is so aggrieved and the grounds to be relied upon as basis for the relief to be demanded at the hearing.

(Emphasis added).

ORDER ON CROSS MOTIONS

No. 16-0002

Page 4

Exhibit 2 (located in Appendix C)

WAC 284-02-070(1)(b) states: "Under RCW 48.04.010 the commissioner is required to hold a hearing upon demand by any person aggrieved by any act, threatened act, or failure of the commissioner to act, if the failure is deemed an act under the insurance code or the Administrative Procedure Act." (Emphasis added). WAC 284-02-070(1)(b)(i) states that a hearing can also be demanded "by an aggrieved person based on any report, promulgation, or order of the commissioner." (Emphasis added).

WAC 284-02-070(1)(a) states that hearings of the OIC are conducted according to RCW Ch. 48.04 and RCW Ch. 34.05. WAC 284.02.070(2)(a) adds that provisions applicable to adjudicative proceedings before the OIC are contained in RCW Ch. 48.04, RCW Ch. 34.05, and WAC Ch. 10-08.

In their respective briefs filed in support of their Cross Motions for Summary Judgment, both Driscoll and the OIC cite to the standard governing standing for purposes of judicial review, RCW 34.05.530, and the case law thereunder, as the basis in determining whether Driscoll has standing for purposes of an adjudicative proceeding before the OIC. However, this is not the correct standard for purposes of the instant adjudicative proceeding before the OIC. As the Presiding Officer for the OIC stated in Order on Intervenors' Joint Motion for Summary Judgment, in OIC Docket No. 13-0293:

Intervenors cite RCW 34.05.530, and acknowledge that this statute sets forth the criteria for judicial review of an agency's decision by the Superior Court, i.e., this statute sets forth the criteria which must be met in order to appeal a final order of this agency's (or any agency's) quasi-judicial executive tribunal to the Superior Court. It does not set forth the criteria which must be met for a party aggrieved by an act of the Commissioner to contest the act before this agency's (or any agency's) quasi-judicial executive tribunal such as this one. While, as Intervenors suggest, RCW 34.05.530 might be somewhat informative because it uses the same word "aggrieved" as RCW 48.04.010, it would be in error to grant summary judgment in this case based on a statute which applies to an entirely different type of review, and based on case law interpreting that inapplicable statute.

(Emphasis added). Case law and scholarly commentary agrees with the OIC Presiding Officer's conclusion in Docket No. 13-0293.

In *Patterson v. Segale*, 171 Wn. App. 251, 257, 289 P.3d 657 (2012), the court stated: "A party's standing to participate in an administrative proceeding, however, is not necessarily coextensive with standing to challenge an administrative decision in a court." The issue of standing at the agency level, and that it must be distinguished from standing for purposes of judicial review, is also addressed in *Washington Administrative Law Practice Manual* (2015), § 9.03[B], which states in part:

Standing. There are two different areas in the adjudicative hearing process where standing is an issue. The first is at the agency level in the adjudicative hearing itself. The second is standing to obtain judicial review. The latter is not within the scope of this chapter and is addressed elsewhere. See Chapter 10 Judicial Review of Administrative Procedure Act Decisions, § 10.02(C), and its discussion of RCW 34.05.530.

In Part IV of the APA, there is no statute that directly addresses standing. RCW 34.05.410 states that "[a]djudicative proceedings are governed by RCW 34.05.413 through 34.05.476, except as otherwise provided." There are three subsections that constitute exceptions to the statement of applicability in this statute. RCW 34.05.530 is a statute in Part V of the APA dealing specifically with judicial review and civil enforcement. By the terms of RCW 34.05.410, RCW 34.05.530 is not a statute that pertains to the question of standing of a party in an adjudicative proceeding. Two cases appear to support the proposition that RCW 34.05.530 only addresses standing to obtain judicial review. *City of Burlington v. Wash. State Liquor Control Bd.*, 187 Wn. App. 853, 876, 351 P.3d 875 (2015), held "[w]e conclude the City has standing to seek judicial review of the Board's decision to allow transfer of a liquor license from the location of a former state-run liquor store. Accordingly, we reverse and remand to the superior court for further proceedings consistent with this opinion." See also *Id.* at n.21. In an earlier case, *Seattle Bldg. & Constr. Trades Council v. Washington State Apprenticeship & Training Council*, 129 Wn.2d 787, 804, 920 P.2d 581 (1996), the Supreme Court held:

We hold that Appellants have standing to seek review of the Apprenticeship Council's approval and registration of CITC's apprenticeship program. We further hold that the APA requires a formal adjudicatory hearing on an application for Apprenticeship Council approval and registration of an apprenticeship program under RCW 49.04. We reverse the superior court, set aside the Apprenticeship Council's approval of CITC's program, and remand this matter for a formal adjudicatory hearing under the APA.

ORDER ON CROSS MOTIONS

No. 16-0002

Page 6

Exhibit 2 (located in Appendix C)

The question of how to obtain standing in an adjudicative proceeding at the agency level is not directly addressed. It is arguable that a person whose interests may be adversely affected by an order, as defined in RCW 34.05.010(11)(a), may have standing to obtain or to participate in an adjudicative proceeding.

(Emphasis added).

As Driscoll does in his Demand, I assume that the OIC's approval of the 22.69% rate increase in the premiums of LTCI at issue in this matter equates to the OIC's issuance of an order. RCW 34.05.010(11)(a) defines "order" as: ". . . without further qualification, means a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons." (Emphasis added). RCW 34.05.010(14) defines "person" as "any individual, partnership, corporation, association, governmental subdivision or unit thereof, or public or private organization or entity of any character, and includes another agency."

The word "aggrieved" in both RCW 48.04.010(1)(b)-(2), and WAC 284-02-070(1)(b)(i), is not defined. To determine the ordinary meaning of an undefined term, we may look to the dictionary. *Garrison v. Washington State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976). "When a statute fails to define a term, we look to the regular dictionary definition when a term has a well-accepted, ordinary meaning. *City of Spokane v. Dep't of Revenue*, 145 Wash.2d 445, 454, 38 P.3d 1010 (2002). However, when "an otherwise common word is given a distinct meaning in a technical dictionary or other technical reference and has a well-accepted meaning within the industry," we turn to the technical, rather than general purpose, dictionary to resolve the word's definition. *Spokane*, 145 Wash.2d at 454. Black's Law Dictionary (8th ed. 2004), a technical reference, defines "aggrieved" as: "(Of a person or entity) having legal rights that are adversely affected; having been harmed by an infringement of legal rights."

Driscoll was not aggrieved by the order (i.e., OIC's approval of the premium rate increase), and therefore his Demand does not trigger the right to a hearing before the OIC under RCW 48.04.010(1)(b)-(2). Assume for the sake of argument the OIC denied Metropolitan Life Insurance Company's ("MetLife's") request, as administrator of the T-C Life LTCI policies at issue, and indemnitor-reinsurer of such policies, for premium rate increases, and issued an order to that effect. In such an instance MetLife and T-C Life would clearly be aggrieved. If they demanded a hearing to contest the OIC's denial, the OIC would be required to hold a hearing. However, the OIC's approval of the rate increase as to LTCI policies at issue in the instant case does not make Driscoll an aggrieved party. The OIC's approval of the 22.69% rate increase in the premiums of LTCI at issue in this matter determined the legal rights or interests of T-C Life and MetLife, not Driscoll. Controlling case law from the courts supports this position.

Appellants in *Newman v. Veterinary Bd. of Governors*, 156 Wn. App. 132, 231 P.3d 840 (2010) had their dog put to sleep following unsuccessful treatment for a disc condition over a six month period. The appellants later filed a report with the Veterinary Board of Governors ("Board") alleging that the veterinarians involved acted unprofessionally while treating their dog. After a nine month review, the Board sent a letter to the appellants informing them their complaint had been fully investigated, and that "there was no cause for disciplinary action against either of the veterinarians because the care provided was within the standards of practice." While the Board was sympathetic to the appellant's experience, it stated it did "not have sufficient evidence to discipline the practitioners." Therefore, in the letter the Board informed the appellants that the cases against the two veterinarians was being closed.

The appellants in *Newman* then requested an adjudicative hearing on the merits before the Board. The Board responded that "administrative rules do not provide an appeal process once the

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[Board] makes a decision to close a case without action.” (Brackets added). In particular, the Board noted that RCW Ch. 34.05 did not provide for an adjudicative hearing on a Board decision not to issue a statement of charges. The appellants then sought judicial review of the Board’s decision by filing a petition for a constitutional writ of certiorari and statutory writ of review in Thurston County Superior Court. The trial court found that the appellants did not comply with the filing requirements of RCW Ch. 34.05, which it concluded were jurisdictional, required strict compliance, and could not be extended. On appeal, the Court in *Newman* agreed with the trial court, and stated in part:

The Newmans assert that the November 10, 2008 letter was a final order and cite *Devore v. Department of Social & Health Services* for the proposition that service of the November 10, 2008 letter on their attorney was not sufficient to start running the 30 day period for review. 80 Wn. App. 177, 906 P.2d 1016 (1995), review denied, 129 Wn.2d 1015 (1996). The Newmans’ position rests on the erroneous assertion that they are parties to the Board’s decision not to file a statement of charges. The Newmans do not cite any authority for the proposition that they had become a party to the agency proceeding by filing a report. Nor does the definition of a “party” under the Administrative Procedure Act support their position. According to RCW 34.05.010(12), a “[p]arty to agency proceedings,’ or ‘party’ in a context so indicating, means: (a) A person to whom the agency action is specifically directed; or (b) A person named as a party to the agency proceeding or allowed to intervene or participate as a party in the agency proceeding.”

¶23 While the Newmans assert that they would have been allowed to intervene, the record does not show that they were in fact allowed to intervene or whether they even asked to intervene. In addition, the agency’s decision not to prepare a statement of charges, if specifically directed at anyone, was directed at the licensees. For example, if the Board had prepared a statement of charges, the Uniform Disciplinary Act specifically directs that action toward only the licensee or applicant. See RCW 18.130.090(1). Because the Newmans were not parties to the agency proceeding, they were not entitled to service of the November 10, 2008 letter under *Devore*.

[22] ¶24 Even if the Newmans were parties, the November 10, 2008 letter was not a “final order” determining their rights. RCW 34.05.010(11)(a) defines an “order” to mean “a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons.” RCW 34.05.010(3) defines an “agency action” to mean licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits. “Licensing’ includes

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that agency process respecting the issuance, denial, revocation, suspension, or modification of a license.” RCW 34.05.010(9)(b). An agency action regarding licensing could also be an order when it finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons. See Devore, 80 Wn. App. at 181 (The parties did not contest that the letter denying license renewal was a final order.). Here, the Board's decision against reconsideration in the November 10, 2008 letter did not finally determine the legal rights or interests of the Newmans. Simply put, the Newmans do not identify their legal interest in having the Board prepare a statement of charges.

156 Wn. App. at 147-148 (emphasis added).

As with the appellants in *Newman*, the OIC’s approval or disapproval of rate increase(s) in the premiums of LTCI, does not provide Driscoll, or others similarly situated, with a right to a hearing or appeal rights under RCW Ch. 34.05 or RCW 48.04.010(1)(b). The policies behind the so-called “filed rate” doctrine buttress this conclusion.

B. Whether the “filed rate” doctrine trumps Driscoll’s Demand.

In *McCarthy Finance Inc. v. Premera*, 182 Wn.2d 936, 941-943, 347 P.3d 872 (2015), the Court applied the “filed rate” doctrine to the OIC’s review and approval of health insurance premiums in the context of a Consumer Protection Act (“CPA”), RCW Ch. 19.86, claim brought by policyholders, and stated:

Health insurance premiums in Washington must be approved by the OIC. RCW 48.44.017(2), .020-.024, .040, .070, .110, .120, .180; WAC 284-43-901, -910 through -930, -945, -950. Among its powers, the OIC may disapprove (1) ambiguous or misleading contracts and deceptive solicitations and (2) contracts the benefits of which are “unreasonable in relation to the amount charged for the contract.” RCW 48.44.020(3), (2), .110. The OIC considers numerous factors when determining whether a health insurance premium is reasonable, including “[h]ow much profit the company expects to make[,] ... generally called ‘contribution to surplus’ or ‘projected profit[,]’ ... [which] depends on the company's current level of surplus as well as the type of business.” CP at 323. The Policyholders do not challenge that the OIC approved the health insurance premiums that the Policyholders paid.

[1-4] ¶10 HN4 Consumers' power to challenge agency-approved rates is limited by the common law filed rate doctrine. See *Wegoland, Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112, 1113-16 (S.D.N.Y. 1992) (providing a history of the doctrine). As this court observed:

The “filed rate” doctrine, also known as the “filed tariff” doctrine, is a court-created rule to bar suits against regulated utilities involving allegations concerning the reasonableness of the filed rates. This doctrine provides, in essence, that any “filed rate”—a rate filed with and approved by the governing regulatory agency—is per se reasonable and cannot be the subject of legal action against the private entity that filed it. The purposes of the “filed rate” doctrine are twofold: (1) to preserve the agency's primary jurisdiction to determine the reasonableness of rates, and (2) to insure that regulated entities charge only those rates approved by the agency. These principles serve to provide safeguards against price discrimination and are essential in stabilizing prices. But this doctrine, which operates under the assumption that the public is conclusively presumed to have knowledge of the filed rates, has often been invoked rigidly, even to bar claims arising from fraud or misrepresentation.

Tenore v. AT&T Wireless Servs., 136 Wn.2d 322, 331-32, 962 P.2d 104 (1998) (footnotes omitted). In cases such as this that involve claims and damages related to agency-approved rates, courts must determine whether the claims and damages are merely incidental to agency-approved rates and therefore may be considered by courts or would necessarily require courts to reevaluate agency-approved rates and therefore may not be considered by courts. See *id.* at 344.

[5] ¶11 But while a court must be cautious not to substitute its judgment on proper rate setting for that of the relevant agency, the legislature has directed that the CPA be liberally construed. See, e.g., RCW 19.86.920; *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009); *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 73, 170 P.3d 10 (2007); *Short v. Demopolis*, 103 Wn.2d 52, 60, 691 P.2d 163 (1984). The mere fact that a claim is related to an agency-approved rate is no bar. The CPA itself addresses the limited times when agency action exempts application of the CPA. See RCW 19.86.170; *Vogt v. Seattle-First Nat'l Bank*, 117 Wn.2d 541, 550-52, 817 P.2d 1364 (1991); *In re Real Estate Brokerage Antitrust Litig.*, 95 Wn.2d 297, 300-01, 622 P.2d 1185 (1980)). In most cases, courts must consider CPA claims even when the requested damages are related to agency-approved rates because, to the extent that claimants can prove damages without attacking agency-approved rates, the benefits gained from courts' considering CPA claims outweigh any benefit that would be derived from applying the filed rate doctrine to bar the claims.

[6] ¶12 In this case, however, rather than requesting general damages or seeking any damages that do not directly attack agency-approved rates, the Policyholders specifically request (1) a “refund[] of the gross and excessive overcharges in premium payments” and (2) a refund of “the amount of the excess surplus.” CP at 28. The Policyholders' requested damages cause their CPA claims to run squarely against the filed rate doctrine. Even assuming that the Policyholders can successfully prove all the elements of their CPA claims, a court's awarding either of the two specific damages requested by the Policyholders would run contrary to the purposes of the filed rate doctrine because the court would need to determine what health insurance premiums would have been reasonable for the Policyholders to pay as a baseline for calculating the amount of damages

and the OIC has already determined that the health insurance premiums paid by the Policyholders were reasonable. Accordingly, the Policyholders' claims are barred by the filed rate doctrine because to award either of the specific damages requested by the Policyholders a court would need to reevaluate rates approved by the OIC and thereby inappropriately usurp the role of the OIC.

(Emphasis added).

Driscoll argues at page 18 of his Response that his Demand does not violate the “filed rate” doctrine because he has not initiated a legal action against MetLife, the entity which filed the LTCI premium rate increase request, but rather has simply filed a Demand “to correct [the] OIC’s erroneous approval of the rate increase request.” (Brackets added). Driscoll’s argument misses the mark. His Demand, as the Spokane County Superior Court found in Cause No. 15-2-00920-1, violates the “filed rate” doctrine” because it seeks to challenge the LTCI premium rates that MetLife filed with the OIC, and the process by which the OIC reviewed and approved the rates charged to the Driscolls, both of which are impermissible. Driscoll’s Demand, and this administrative matter, involve claims related to agency-approved rates, which are *not* incidental to agency-approved rates, and therefore would necessarily require courts to reevaluate agency-approved rates. Such claims may not be considered by the courts or myself under *Premera*. That said, under *Premera* and other case law, the CPA, RCW Ch. 19.86, is available to Driscoll, provided he does not violate the “filed rate” doctrine.

C. Whether a CPA cause of action against MetLife and T-C Life is available to Driscoll.

RCW 48.83.150 states that a “person engaged in the issuance or solicitation of long-term care coverage shall not engage in unfair methods of competition or unfair or deceptive acts or practices, as such methods, acts, or practices are defined in chapter 48.30 RCW, or as defined by

the commissioner.”¹ RCW 48.84.060 notes prohibited practices involving LTCI and states in part: “No insurance producer or other representative of an insurer, contractor, or other organization selling or offering long-term care insurance policies or benefits may: . . . (3) use or engage in any unfair or deceptive act or practice in the advertising, sale, or marketing of long-term care policies or contracts.”

RCW 19.86.020 states: “Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” RCW 19.86.170 provides that actions and transaction prohibited or regulated under laws which the OIC administers shall be the subject to the provisions of RCW 19.86.020, and the remainder of RCW Ch. 19.86 which provide for the implementation and enforcement of RCW 19.86.020, and states in part:

Nothing in this chapter shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington utilities and transportation commission, the federal power commission or actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States: PROVIDED, HOWEVER, That actions and transactions prohibited or regulated under the laws administered by the insurance commissioner shall be subject to the provisions of RCW 19.86.020 and all sections of chapter 216, Laws of 1961 and chapter 19.86 RCW which provide for the implementation and enforcement of RCW 19.86.020 except that nothing required or permitted to be done pursuant to Title 48 RCW shall be construed to be a violation of RCW 19.86.020:

(Emphasis added).

In *Pain Diagnostics v. Brockman*, 97 Wn. App. 691, 697-698, 988 P.2d 972 (1999), the Court emphasized that the insurance regulatory scheme was not designed to protect or provide remedies for individuals, but rather to regulate the insurance industry, whereas the CPA was the proper venue for private causes of action, stating in part:

¹ As RCW 48.83.010 notes, RCW Ch. 48.83 only applies to LTCI policies delivered or issued for delivery in the state of Washington on or after January 1, 2009.

In creating the insurance regulatory scheme, the Legislature and the insurance commissioner did not intend to provide protection or remedies for individual interests; they intended only to create a mechanism for regulating the insurance industry. Escalante v. Sentry Ins., 49 Wn. App. 375, 389, 743 P.2d 832, review denied, 109 Wn.2d 1025 (1988). Instead, private causes of action for violations of the insurance statutes and regulations must be brought under the CPA. Escalante, 49 Wn. App. at 390; see also Industrial Indem. Co. of the N.W., Inc. v. Kallevig, 114 Wn.2d 907, 924, 792 P.2d 520, 7 A.L.R. 5th 1014 (1990).

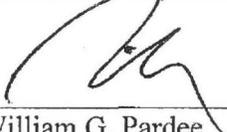
(Emphasis added). See also *Graham-Bingham Irrevocable Trust v. John Hancock Life Insurance Co.*, 827 F. Supp.2d 1275, 1281-1282 (W.D. Wash. 2011)(“RCW Title 48, however, does not create a private cause of action)(citing Court’s decision in *Brockman*).

The appropriate forum for Driscoll to challenge MetLife or T-C Life business practices, or allege unfair or deceptive acts or practices on their part, is via a CPA cause of action, provided it does not infringe upon the “filed rate” doctrine as outlined in *Premera*, and explained in **B.** above.

Ruling.

Driscoll’s Cross Motion for Summary Judgment is denied. The OIC’s Cross Motion for Summary Judgment is granted.

Dated: June 15, 2016



William G. Pardee
Presiding Officer

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 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.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the state of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be filed and served the foregoing Order on Cross Motions for Summary Judgment on the following people at their addresses listed below:

Leo J. Driscoll
4511 E. North Glenngrae Lane
Spokane, WA 99223

Mike Kreidler, Insurance Commissioner
James T. Odiorne, J.D., CPA, Chief Deputy Insurance Commissioner
Doug Hartz, Deputy Commissioner, Company Supervision Division
Molly Nollette, Deputy Commissioner, Rates and Forms Division
AnnaLisa Gellermann, Deputy Commissioner, Legal Affairs Division
Mandy Weeks, Insurance Enforcement Specialist, Legal Affairs Division
Office of the Insurance Commissioner
PO Box 40255
Olympia, WA 98504-0255

Dated this 15th day of June, 2016, in Tumwater, Washington.


Dorothy Seabourne-Taylor
Paralegal
Hearings Unit