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State of Washington

NO. 340881

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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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LEO J. DRISCOLL,

Petitioner,

v.

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

Respondents.

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**BRIEF OF RESPONDENT, WASHINGTON STATE  
INSURANCE COMMISSIONER**

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## **I. INTRODUCTION**

The Insurance Code establishes a 90 day statute of limitations to administratively challenge the actions, decisions, and orders of the Insurance Commissioner. Although Mary and Leo Driscoll received notice of an increase in their long-term care insurance rates on December 9, 2011, they declined to challenge the order approving those rates until September 19, 2014, well beyond the applicable filing requirements. Therefore, the Commissioner properly held that Mr. Driscoll's administrative challenge is time barred.

Though the Driscolls set forth numerous arguments and alleged errors, they have not established an error of law, an unsupported fact, an abuse of discretion, or any of the other limited grounds for review of agency action required by RCW 34.05.570, and cannot show that it was error for the Commissioner to dismiss their Demand for Hearing as untimely. Even if timely, the Driscolls lack standing to challenge the Commissioner's order granting the rate increase. Therefore, the Commissioner respectfully requests that this Court affirm the Commissioner's Order on OIC Staff's Motion for Summary Judgment ("Final Order") dismissing Mr. Driscoll's hearing demand.

## **II. COUNTER-STATEMENT OF THE ISSUES**

1. Is an administrative challenge to the Insurance Commissioner's approval of a rate increase time-barred when it is brought more

than 90 days after notice of the rate increase is received by the Petitioner?

2. Where there is no statutory or contractual guarantee that a rate will remain static, and no other allegation of injury is articulated, is a person challenging the rate increase aggrieved?
3. Does the Filed Rate Doctrine bar judicial review of the Commissioner's approval of rates, with the ultimate objective of review being to challenge a change in the rates?

### **III. STATEMENT OF THE CASE**

#### **A. Role Of The Insurance Commissioner**

The Office of the Insurance Commissioner, among other duties to regulate the insurance industry, approves or disapproves proposed rates filed by insurance companies including rate filings for long-term care insurance policies. RCW 48. The Insurance Code (Title 48 RCW), in combination with the Washington Administrative Code (Title 284 WAC), provides the requirements for rate filings, including rate filings affecting disability insurance premiums. WAC 248-58. Washington law defines disability insurance to include long-term care insurance. RCW 48.11.030. As a result, most statutes and rules pertaining to disability insurance also apply to long-term care insurance. However, statutes and rules specific to long-term care insurance supplement the general provisions for disability insurance. *See* RCW 48.83, RCW 48.84, WAC 284-54, and WAC 284-83.

The Insurance Code specifies various considerations that must be taken into account in the setting of rates, including past and prospective loss experience, hazards, profitability, and expenses. *See* RCW 48.83, RCW 48.84, WAC 284-54, and WAC 284-83. Washington's insurance statutes and rules also provide detailed guidelines for determining whether a rate filing is justified, excessive, inadequate or discriminatory. *See* RCW 48.19.030 and WAC 284-54-600. The Insurance Commissioner undertakes a review of a rate filing as soon as reasonably possible.

Because of concerns about long-term care insurance premium rate increases, its effect on consumers, and the future problems for policyholders if there are not enough funds to cover benefits, all rate filings with premium rate increases are submitted with evidence supporting the filing. *See* WAC 284-54-630. All of these materials are reviewed by the Commissioner's staff actuaries, who can request further information to evaluate the rate filing. *Id.* When all information is reviewed, the Commissioner disapproves the rate filing if it is excessive, inadequate, or unfairly discriminatory. The Commissioner continues to try to find solutions to problems surrounding long-term care insurance, independently in the State of Washington, and nationally with the National Association of Insurance Commissioners ("NAIC").

#### **B. Overview of Long-Term Care Insurance**

Long-term care insurance is an important, but challenging insurance product. The services provided under most long-term care insurance policies can range from "direct skilled medical care performed

by trained medical professionals . . . to rehabilitative services and assistance with the basic necessary functions of daily living for people who have lost some or complete capacity to function on their own.” WAC 284-54-015. Long-term care insurance is generally structured around a number of benefit options selected by enrollees with prolonged illnesses or disabilities. *LONG-TERM CARE INSURANCE, Carrier Interest in the Federal Program, Changes to Its Actuarial Assumptions, and OPM Oversight*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE (July 2011),<sup>1</sup> (“GAO Report”) at 8. These can include: the types of services covered (such as care in the home or in a nursing home or both); the daily benefit amount; the benefit period (which can range from one year to a lifetime); the length of the waiting period before insurance will provide coverage; and inflation protection to help ensure that daily benefit amounts remain commensurate with costs of care. *Id.*

Premiums are affected by many factors including actuarial assumptions such as lapse, mortality, morbidity, and projected returns on investment. *Id.* at 9; *see also* Dawn Helwig, *The Cost of Waiting*, AMERICAN ACADEMY OF ACTUARIES, CONTINGENCIES (NOV|DEC. 14),<sup>2</sup> (“Actuarial Article”) at 22. Lapse reflects the expected portion of policyholders who drop their coverage each year. *GAO Report*, at 9. Mortality is based upon the life expectancies of the enrollee

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<sup>1</sup> <http://www.gao.gov/assets/330/322553.pdf>, (Last visited September 29, 2016)

<sup>2</sup> <http://www.contingenciesonline.com/contingenciesonline/20141112> (Last visited September 29, 2016)

population by age. *Id.* at 10. Morbidity is based upon the amount of claims costs expected for enrollees, by age, and accounts for the portion of enrollees of each age who file a claim and the duration of those claims. *Id.* The return on investment assumption reflects the expected interest rate earned on invested assets. *Id.* Actuarial assumptions are projections about the future and can change over time as carriers gain more claims experience, especially with newer products.

Setting premiums at an adequate level to cover future costs has been a challenge for some carriers. *Id.*; *see also Actuarial Article*. Long-term care insurance is a relatively new insurance product that started developing between 1970 and 1989. *Id.*; *see also* Kimberly Lankford, *Long-Term-Care Rate Hikes Loom*, KIPLINGER (January 2011),<sup>3</sup> (“Kiplinger Article”). Furthermore, it can take several decades before enrollees submit claims and for carriers to obtain data on how their enrollees will use their policies. *GAO Report*, at 10. Many carriers have lacked and may continue to lack sufficient data to estimate the revenue needed to cover the costs of the policies. *Id.*, at 10-11; *see also Actuarial Article*. This has led to changes in the marketplace; many insurers left the marketplace, or consolidated to form larger companies, and most of the remaining companies have raised premiums to account for initial actuarial assumptions that did not adequately cover current projected costs. *Id.*; Chad Terhune, *CalPERS Plans 85% Rate Hike for Long-Term-Care*

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<sup>3</sup> <http://www.kiplinger.com/article/insurance/T036-C000-S002-long-term-care-rate-hikes-loom.html>, (Last visited September 29, 2016)

*Insurance*, LOS ANGELES TIMES (February 21, 2013)<sup>4</sup>; (“LA Times”) and Howard Gleckman, *What’s Killing The Long-Term Care Insurance Industry*, FORBES (August 29, 2012),<sup>5</sup> (“Forbes”).

**C. The Driscolls Long-Term Care Insurance And The 2011 MetLife Premium Rate Request**

In 2002, Mary and Leo Driscoll (the “Driscolls”) purchased long-term care insurance policies from TIAA-CREF, which were assumed by Metropolitan Life Insurance Company (MetLife) in 2004. AR 163 and 292. In 2011, MetLife submitted a rate filing to the Office of the Insurance Commissioner that increased the premium rates by 41% for a long-term care insurance product line based upon the anticipated loss ratio. AR 163 and 199. The MetLife rate filing advised that the increase would only be implemented after approval by the Office of the Insurance Commissioner with a sixty (60) day notice to policyholders prior to the first effective date of the rate change. AR 164. No prior rate increase for these long-term care policies had previously been filed. AR 163 and AR 244.

The purpose of the 2011 MetLife rate filing was to ensure that the premiums charged collected enough funds to cover the losses for that block of policies. AR 199. The Commissioner’s staff actuaries still have concerns that even with this change in premiums, the products would be presently operating at an 88.2% loss ratio. AR 245. Operating at such a

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<sup>4</sup> <http://articles.latimes.com/2013/feb/21/business/la-fi-calpers-longterm-care-20130222>, (Last visited September 29, 2016)

<sup>5</sup> <http://www.forbes.com/sites/howardgleckman/2012/08/29/whats-killing-the-long-term-care-insurance-industry>, (Last visited September 29, 2016)

high loss-ratio could potentially violate the protections of WAC 284-83-230(6), which requires that loss ratios must provide for future reserves, and must account for the maintenance of such reserves for future needs.

On June 10, 2011, MetLife submitted information to support the rate filing. AR 243-244. The Office of the Insurance Commissioner's actuarial staff, experienced with insurance rate filings, reviewed the request and supporting materials. While the MetLife rate filing sought to increase the premium rates for policyholders, the actuarial staff determined the rates were not excessive, inadequate, or unfairly discriminatory. AR 245. MetLife also submitted modified policy forms to reflect the 2011 rate filing. The rate request and related forms were approved and notification sent to MetLife on August 17, 2011. AR 218; AR 236. The approval was entered and posted by the Commissioner's staff to the Commissioner's Rate and Form Filing database. AR 236.

On December 9, 2011, the Driscolls received notice from MetLife that the 2011 rate filing had been approved. AR 264. Notices to policyholders were required to be sent sixty (60) days prior to the policyholder's next policy term, when the new premium rates would begin. AR 164. After receiving this notice, policyholders such as the Driscolls, took actions to reduce their coverage, pay the new premium, or exercise the nonforfeiture coverage as allowed under the policy. The Driscolls opted to pay the new premiums, and did so for nearly three years. AR 265.

On September 19, 2014, nearly three years after they received notice from MetLife that the 2011 rate filing had been approved, the Driscolls filed a Demand for Hearing disputing the approval of this rate filing. The Commissioner issued a final order dismissing the Driscolls' Demand for Hearing as untimely, and later denied the Driscolls' Petition for Reconsideration. AR 01-09. The Commissioner also denied the Driscolls' subsequent motion titled—Request for Decision as to the Request for Hearing and Adjudication of Count 2, Motion that the “Order on OIC Staff’s Motion for Summary Judgment” be Clarified and Supplemented as to Count 2—which requested clarification of the Commissioner’s order. AR 10-11. On judicial review, the Superior Court affirmed the Final Order of the Commissioner and subsequently denied the Driscolls’ Motion for Reconsideration. CP 70-71; CP 335-337. The Driscolls then filed their Notice of Appeal challenging only dismissal of Count 3 of their Demand for Hearing. CP 81-86; *Brief of Petitioner* at 1. Count 3 seeks an order from the Commissioner withdrawing approval of Policy Schedule forms and the underlying rates related to the Driscolls’ specific long-term care disability plan. AR 32-34.

#### **IV. STANDARD OF REVIEW**

The Administrative Procedure Act (APA) governs judicial review of agency orders. *Mills v. W. Wash. Univ.*, 170 Wn.2d 903, 909, 246 P.3d 1254 (2011). “The burden of demonstrating the invalidity of agency action is on the party asserting invalidity[.]” RCW 34.05.570(1)(a). On review of an agency decision, this Court sits in the same position as the

superior court and applies the standards of the Administrative Procedure Act. *Tapper v. State Emp. Sec. Dep't.*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). Review is limited to the administrative record before the agency. RCW 34.05.558. “To reverse an administrative order, a reviewing court must find that the order (1) is based on an error of law; (2) is based on findings not supported by substantial evidence; (3) is arbitrary or capricious; (4) violates the constitution; (5) is beyond the statutory authority; or (6) the agency has engaged in an unlawful procedure or decision making process or has failed to follow a prescribed procedure.” *Martin v. Criminal Justice Training Comm’n*, 154 Wn. App. 252, 260, 223 P.3d 1221 (2009) (internal citation omitted); RCW 34.05.570(3). A reviewing court will accord “substantial weight to the agency’s interpretation of the law it administers—especially when the issue falls within the agency’s expertise.” *Kelly v. State*, 144 Wn. App. 91, 96, 181 P.3d 871 (2008). Thus, “[a]lthough a commissioner cannot bind the courts, the court appropriately defers to a commissioner's interpretation of insurance statutes and rules.” *Credit Gen. Ins. Co. v. Zewdu*, 82 Wn. App. 620, 627, 919 P.2d 93 (1996). Keeping in mind this deference, the Court reviews the Commissioner’s legal conclusions de novo. *See Motley-Motley, Inc. v. State*, 127 Wn. App 62, 72, 110 P.3d 812 (2005).

## V. ARGUMENT

The Driscolls challenge only dismissal of Count 3 of their Demand for Hearing. *Brief of Petitioner* at 1. Count 3 seeks an order from the Commissioner that withdraws approval of certain long-term care rates

previously approved on June 22, 2011. The Brief of Petitioner sets forth a plethora of alleged errors but fails to show that the Commissioner's dismissal of Count 3 of Driscolls' Demand for Hearing was based on an actual error of law, was unsupported by substantial evidence, was arbitrary and capricious, violated the constitution, was beyond the Commissioner's statutory authority, or was the result of unlawful procedure. The Driscolls thus fail to meet their burden and the Commissioner's Final Order should be affirmed.

**A. The Driscolls' Demand For Hearing Was Properly Dismissed As Time Barred By The Ninety (90) Day Statutory Filing Requirements Of Title 48 RCW**

Any possible right to a hearing the Driscolls had was conclusively waived 90 days after the Driscolls received notice of the order approving the rate filing. *See* RCW 48.04.010(3). The Commissioner properly held that the Driscolls' Demand for Hearing has been conclusively waived pursuant to RCW 48.04.010(3) because they failed to file their demand within 90 days of receiving notice that MetLife's rate filing had been approved.

Title 48 RCW provides that "[u]nless a person aggrieved by a written order of the commissioner demands a hearing thereon within ninety days after receiving notice of such order ... the right to such hearing *shall conclusively be deemed to have been waived.*" RCW 48.04.010(3) (emphasis added). Chapter 48.04 RCW, titled Hearings and Appeals, governs hearings under Title 48. *See* RCW 48.04.010. Thus, a demand for hearing under Title 48 must be filed within ninety (90) days of

receiving notice of the underlying order. An “order” is 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).

The Driscolls attempt to circumvent this filing requirement by characterizing the Commissioner’s order approving the rate as a failure to act rather than what actually occurred, which was the issuance of an order. Because RCW 48.04.010(3)—which contains the 90 day limitation period—applies to a written order, the Driscolls contend that the limitation period does not apply to their claim. *See Brief of Petitioner* at 19-20 (claiming grounds for the Demand for Hearing were for “failures of duty of the Commissioner to act as required by provisions of the insurance code and regulations...”). However, these arguments have no basis in law or fact. First, an order was entered on August 17, 2011, that approved the MetLife rate filing. AR 236. This was an “order” as it was a written statement of particular applicability that finally determined the legal rights or other legal interests of MetLife in regards to its rate filing. The Driscolls do not dispute having received notice of this order on December 9, 2011. AR 264; *Brief of Petitioner* at 21. If the Driscolls were aggrieved, it was by this order. Further, RCW 48.04.010(3) must be read as a whole, contrary to the Driscolls’ interpretation. “In construing a statute, we give effect to all its language so that no portion is rendered meaningless or superfluous.” *Friends of Columbia Gorge, Inc. v. Wash.*

*State Forest Practices Appeals Bd.*, 129 Wn. App. 35, 47, 118 P.3d 354 (2005).

The structure of RCW 48.04.010 provides when hearings must be held and then places restrictions and conditions on requesting those hearings. It provides that the Commissioner shall hold a hearing:

[U]pon 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.

RCW 48.04.010(1)(b). The statute further provides a person aggrieved by an order of the Commissioner must request a hearing within 90 days. RCW 48.04.010(3). Subsection (1) establishes the basis for a hearing. The remainder of the sections place restrictions on these hearings. For example, subsection (2) provides “[a]ny 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.” The only reasonable interpretation is that subsection (2)’s requirements are directed at the “written demand for a hearing” discussed in subsection (1). Similarly, subsection (5) modifies subsection (1) by providing that a Title 48 licensee may request an administrative law judge assigned under Chapter 34.12 RCW. Subsections (4) and (6) also modify the hearing authority created by subsection (1). These sections would be rendered superfluous if read in isolation.

Subsection (3)'s 90 day filing requirement would also be rendered superfluous if read in isolation from subsection (1)(b). Contrary to the Driscolls' assertion that the subject matter of a subsection be restricted to its own subsection, the subsections of RCW 48.04.010 supplement, condition, and restrict one another as is common throughout statutes and rules. The Driscolls are correct to the extent they assert that subsection (3)'s ninety (90) day restriction applies to a "grievance arising from 'a written order of the commissioner'." *Brief of Petitioner* at 20. However, they are incorrect that their alleged grievance arises from a failure to act by the Commissioner. The record supports the conclusion that the Commissioner's decision to approve the rate filing was based on a written order by the Commissioner. Once the Driscolls received notice of that order, they had 90 days to request a hearing. RCW 48.04.010(3).

The Driscolls' reliance on *Landmark Dev., Inc. v. City of Roy*, 138 Wn. 2d 561, 980 P.2d 1234 (1999), is misplaced. *Brief of Petitioner* at 20. There, the Court was interpreting legislation that addressed the calculation of certain fees on municipal water and sewer corporations in Washington. *Id.* at 570. In doing so the Court noted that "[l]egislative inclusion of certain items in a category implies that other items in that category are intended to be excluded." *Id.* at 571 (internal citations omitted). The Court explained that there are four types of water and sewer corporations but that the legislature only considered fees with regard to "three of the four municipal corporations." *Id.* at 571. Thus, the Court held that "the inclusion or expression of the three types of water corporations in the

legislation adds forceful argument to an interpretation that the Legislature's exclusion of the remaining fourth type of corporation . . . was intentional." *Id.* This case is inapplicable to interpretation of RCW 48.04.010, which discusses hearings under Title 48 and does not discuss "certain items in a category."

Thus, to the extent the Driscolls were aggrieved by the Commissioner's decision to approve the rate increase, they had 90 days after they received notice to demand a hearing. Instead of filing a demand for a hearing within 90 days, however, the Driscolls filed their demand 33 months after they received such notice. Because the Driscolls failed to file their demand for a hearing within 90 days, their right to a hearing was conclusively waived. The Driscolls assert that they did not know what information had been submitted by MetLife to the Commissioner in support of the rate filing until July 16, 2012. *Brief of Petitioner* at 21. However, it is irrelevant when the Driscolls first reviewed information that was filed in support of the rate filing because the 90 day filing requirement is triggered by notice of the written order of the Commissioner, which the Driscolls received on December 9, 2011 *See* RCW 48.04.010(3). The Driscolls have provided no authority that the time limits for seeking review of administrative orders are subject to a discovery rule or other tolling. And even if the Driscolls could somehow establish they were "aggrieved," and even if the 90 day filing requirement was somehow tolled to July 16, 2012, they still failed to timely file their Demand for Hearing.

Under the Driscolls' interpretation of RCW 48.04.010 any person could demand a hearing to challenge a rate filing at any time simply by claiming that the Commissioner failed to act. Further, there would be no limitation on the number of such demands that could be made. This interpretation would provide no closure or certainty to consumers or insurers who rely on rate filings to set rates. The Driscolls' also urge this Court to apply the three year statute of limitations from Title 4 RCW, Civil Procedure, which provides for a three year statute of limitations for filing an action for "taking, detaining, or injuring personal property... or for any injury to the person or rights of another not hereinafter enumerated." RCW 4.16.080(2); *Petitioner's Brief* at 27-30. However, Title 4 is inapplicable to an agency adjudicative proceeding. Rather, such proceedings are governed by Chapter 34.05, the Administrative Procedures Act. *See* RCW 34.05.410-.494. None of the cases cited by the Driscolls support their contention that a statute of limitations, which governs civil actions filed directly in the courts, would apply to an administrative action before an agency. If the Driscolls had filed suit against the Commissioner in the courts then Title 4 would likely apply. However, the Driscolls sought a hearing before an agency and must operate under the Administrative Procedures Act.

The Driscolls should not be permitted, almost three years after an order approving rates, to unwind that order by mischaracterizing it as a failure to act. This Court should decline their attempt to do so.

**B. The Driscolls Lack Standing To Challenge The 2011 Rate Filing Because They Are Not “Aggrieved” For Purposes Of Title 48 RCW**

Even if the Driscolls’ claims are not barred by their failure to timely file, or by the Filed Rate Doctrine (discussed below), the Commissioner’s Final Order should nonetheless be affirmed because they lack standing to challenge the filed rate as they were not “aggrieved” by approval of the rate.

The Driscolls are not “aggrieved” persons as required by Title 48 RCW because they have failed to demonstrate harm to a protected interest. The Insurance Code requires the Commissioner to hold a hearing if requested in writing by “any person aggrieved by any act, threatened act, or failure of the commissioner to act.” RCW 48.04.010(1); *see also* WAC 284-02-070(1)(b) (providing that the Commissioner must “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.”). Further, “[a]ny such demand for a hearing shall specify in what respects such a person is so aggrieved....” RCW 48.04.010(2). “Aggrieved” is not defined in either Title 48 RCW or Title 284 WAC. Where a term is not defined by statute the courts look to the regular dictionary definition of the term. *City of Spokane v. Dep’t of Rev.*, 145 Wn.2d 445, 454, 38 P.3d 1010 (2002). When an ordinary term is given a distinct technical meaning the courts look to a technical dictionary. *Id.* Black’s Law Dictionary defines “aggrieved” as “having legal rights that are adversely affected; having

been harmed by an infringement of legal rights.” *Black’s Law Dictionary* (8<sup>th</sup> ed. 2004).

The Driscolls were not aggrieved by the Commissioner’s approval of the long-term care rates because they have no legal right to continued static rates and, even if they did have such a right, the Driscolls fail to allege harm resulting from the Commissioner’s process. While the Driscolls’ were undoubtedly *affected* by the rate increase, they must show that they were *adversely* affected or harmed by the increase. There is no allegation that the rates were inaccurately projected by analysts, that they were excessive, or that they were discriminatory. Rather, the Driscolls claim that the actuarial methods used to evaluate the rate filing were not correct. Even if right, however, the Driscolls do not allege that had the Commissioner followed their strict requirements the rate would not have been approved or would not have been approved at an even higher level. In fact, though the Commissioner did not reach the issue, the record supports that the rate would have been approved as is or even at a higher rate. AR 245. Thus, their contentions fail to provide sufficient grounds to justify a hearing, as they fall short of making the mandatory showing that they were adversely affected or harmed by an act of the Commissioner. Because the Driscolls have not carried their burden to show that they are “aggrieved” by approval of the rate, they lack standing to challenge the filed rate. This claim therefore fails.

**C. The Superior Court Properly Held That The Filed Rate Doctrine Barred It From Granting The Relief Requested By The Driscolls**

Under the APA, this Court reviews the Commissioner's Final Order, which dismissed Mr. Driscoll's claims as time barred. Therefore, this Court need not address whether the Filed Rate Doctrine applies. However, if the Court did address the issue, the Superior Court properly held that the Filed Rate Doctrine would prevent the court from directly or indirectly reevaluating the rates approved by the Commissioner. The Driscolls have not identified any legal error in the Superior Court's explanation of the Filed Rate Doctrine. Rather, the Driscolls assert that it does not apply to their claims because they purportedly are not asking the courts to reevaluate the approved rate. This characterization of the requested relief is contradicted by their hearing demand, and their own arguments. The Filed Rate Doctrine is a court-created rule and provides that a rate filed with, and approved by, a regulatory agency is *per se* reasonable as a matter of law. *McCarthy Fin. v. Premera*, 182 Wn.2d 942, 347 P.3d 872, 875 (2015).

The Driscolls claim that they want only review of the process, and not the rate itself, is disingenuous. The Driscolls' original Demand for Hearing explicitly challenged the reasonableness of the rates. For example, in Count 3 of their Demand for Hearing the Driscolls contended 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 the increased rates. AR 33 ¶ 3.9 (emphasis

added). Similarly, the Driscolls allege that the ongoing use of the approved rates “unfairly and inequitably profits MetLife....” AR 34 ¶ 3.10. Further, the Driscolls’ assertion that the Filed Rate Doctrine does not apply in this case because they seek only prospective relief is inaccurate. They explicitly ask the Court to order the Commissioner to withdraw his approval of the current rate. *Brief of Petitioner* at 17. In their original hearing demand, and as subsequently amended, the Driscolls ask that MetLife be barred from charging the currently approved rate. The courts cannot grant the relief expressly sought by the Driscolls without evaluating the reasonableness of the rates. For these reasons, the Superior Court did not err in concluding that the Filed Rate Doctrine barred it from granting the relief sought by the Driscolls. In light of the above, this Court should adopt the Spokane Superior Court’s holding that the Filed Rate Doctrine bars review of the Driscolls’ claims by the courts.

**D. The Driscolls’ Arguments That Do Not Address The Final Order Have No Relevance To This Court’s Decision**

The Commissioner’s Final Order is the basis for this Court’s judicial review. That order dismissed the Driscolls’ Demand for Hearing because of their failure to timely file, contrary to RCW 48.04.010(3). As such, the order issued by the Commissioner did not reach the merits of the case. Therefore, there has not been an evidentiary hearing or findings concerning the merits of the Driscolls’ various additional arguments addressed in their opening brief. Arguments relating to the merits of the case are, therefore, not properly before this Court. Even if the Court does

not find the claim barred, it should remand to the agency for further proceedings on the merits. In any event, the Driscolls' claims on the merits fail.

1. **This Court need not address whether RCW 48.19.310 is applicable to Count 3 because it has no bearing on this Court's decision.**

Whether RCW 48.19.310 is applicable to Count 3 is irrelevant to this Court's decision because the Driscolls' Demand for Hearing was dismissed for failure to timely file. The Driscolls assert that it was error for the Final Order to find that the Driscolls had a reasonable opportunity to be heard under RCW 48.19.310.<sup>6</sup> *Brief of Petitioner* at 26. However, the Driscolls misunderstand or misconstrue the Final Order. When discussing RCW 48.19.310, the Final Order addressed the Driscolls' assertion that they enjoy due process protections related to their long-term care rates. AR 006 ¶ 20. In doing so, the Final Order noted that the Driscolls had notice and an opportunity to be heard under RCW 48.04.010—the Insurance Code's hearings and appeals section including the ninety (90) day filing requirement—and noted parenthetically that RCW 48.19.310 also provides notice and an opportunity to be heard where an individual is aggrieved by application of an insurer's rating system. AR 006 ¶ 20. The Final Order merely sets forth the various means by

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<sup>6</sup> RCW 48.19.310 requires insurers to provide an opportunity for a person aggrieved by an insurer's rating system to be heard by the insurer and further provides for an opportunity to appeal the insurer's decision to the Commissioner.

which an individual's due process protections could be satisfied, assuming *arguendo* that they existed.

**2. The Final Order did not rely on any contested material facts.**

Driscolls' remaining arguments are related to facts and issues not reached by the Commissioner or the Superior Court. Thus, even if there is a dispute as to facts on the record, they are not material to the Final Order's dismissal of the Demand for Hearing.

For example, the Driscolls variously contend that the record does not support MetLife's assumption of the subject policies. *Brief of Petitioner* at 29 § I; that the record effectively admits the rate filing was not supported by sufficient information, *Brief of Petitioner* at 22 § D; that insufficient information was submitted to the Commissioner on efforts to ascertain Washington state or similar loss experience to support the rate filing, *Brief of Petitioner* at 25 § F; and that they did not have sufficient opportunity to respond to arguments made by the Commissioner's staff, *Brief of Petitioner* at 23 § E. None of these contentions address the Driscolls' failure to timely file their Demand for Hearing or the applicability of the Filed Rate Doctrine. Even if this Court finds that these arguments are somehow relevant to the Final Order, they are individually meritless.

First, the Commissioner's conclusion that MetLife and TIAA CREF entered into these agreements is supported by substantial evidence. In its letter to the Commissioner, MetLife explained that it had entered

into indemnity reinsurance agreements and assumption reinsurance agreements relating to the subject policies. AR 163. It also included a letter from TIAA CREF confirming the reinsurance and assumption agreements. AR 165.

Second, the Driscolls mischaracterize the record in asserting that it admits the rate filing was unsupported by sufficient information. Scott Fitzpatrick, an actuary currently employed by the Commissioner, filed a declaration that explained Washington-specific rates were not filed with the rate filing because those rates would be statistically inaccurate and misleading. AR 53 ¶ 18. Mr. Fitzpatrick's declaration explained that the small number of policies sold in Washington would not allow for statistical credibility, which allowed the insurer to submit information based on the national level, as allowed by Title 48, RCW. AR 53 ¶ 19-22. A tortured interpretation of Mr. Fitzpatrick's declaration is necessary to read it as an admission that the rate filing was unsupported.

Third, there is substantial evidence in the record that MetLife filed all of the required information. The actuary who reviewed the 2011 filing is no longer employed by the Office of the Insurance Commissioner. AR 243. However, Scott Fitzpatrick conducted a thorough review of the 2011 filing and supporting documentation. AR 242-243. Pursuant to his review, Mr. Fitzpatrick concluded that MetLife had submitted all required information pursuant to applicable statutes and rules. AR 243. He also concluded that the rate filing was consistent with other typical rate filings. AR 54, 244.

Finally, the Driscolls' contention that they did not have sufficient opportunity to respond to arguments made by Commission staff's reply brief is meritless. The reply brief was timely filed and responded to arguments presented by the Driscolls in their response brief to Commission staff's Motion for Summary Judgment. Regardless, the Commissioner's Final Order made no findings of fact or conclusions of law as to the merits of the statistical analysis used by the Commissioner's actuarial staff in approving the rate filings. Other than the unfounded assertion that arguments in the reply brief were untimely, it is unclear what procedure or evidentiary rules the Driscolls believe were violated.

**E. This Court Should Deny The Driscolls' Request For Costs And Fees As The Commissioner's Action Was Substantially Justified**

The Commissioner's decision to dismiss the Driscolls' Demand for Hearing was substantially justified as it had a reasonable basis in law and fact. Therefore, even if the Driscolls prevail before this Court their request for costs and fees should be denied.

Costs and fees are available to a "qualified party" that prevails on judicial review of agency action unless the agency action was "substantially justified" or an award would be unjust. RCW 4.84.350(1). A "qualified party" is "an individual whose net worth did not exceed one million dollars at the time the initial petition for judicial review was filed or (b) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed five million dollars at the time the initial petition for judicial review was

filed...” RCW 4.84.340(5). Agency action is substantially justified where it has a reasonable basis in law and fact. *Brown v. Dep’t of Soc. and Health Serv.*, 190 Wn. App. 572, 360 P.3d 875 (2015). While there is nothing in the record to indicate whether the Driscolls would be qualified parties, the Commissioner’s actions were substantially justified at all points in these proceedings. The Commissioner’s decision to dismiss the Driscolls’ claims as untimely filed was correct in light of the 90 day filing requirement and in light of the Driscolls’ failure to file until almost three years after receiving notice of the rate increase.

The Driscoll’s also seek costs pursuant to RCW 34.05.566, which addresses the cost for the record on review of an agency action and allows costs against a party “who unreasonably refuses to stipulate to shorten, summarize, or organize the record.” RCW 34.05.566(5). There is nothing in the record or communications between the parties that would support the conclusion any party unreasonably refused to shorten, summarize, or organize the record.

## VI. CONCLUSION

The Driscolls bear the burden of demonstrating the invalidity of the Commissioner’s final agency action dismissing the Demand for Hearing. They fail to show that their Demand for Hearing was timely filed, that the Filed Rate Doctrine does not bar their claims, or that they are aggrieved parties within the meaning of Title 48 RCW. This Court need only conclude that the Driscolls’ claims are untimely and any right they may have had to demand a hearing has been conclusively waived.

However, even if the Driscolls' claims are seen as timely, this Court should conclude that those claims are nevertheless barred by the Filed Rate Doctrine and for lack of standing. Accordingly the Office of the Insurance Commissioner respectfully requests that the Court affirm the Final Order.

DATED this 28th day of September, 2016.

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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

LEO J. DRISCOLL,

Petitioner,

v.

WASHINGTON STATE INSURANCE  
COMMISSIONER, et al.,

RespondentS.

CERTIFICATE OF  
SERVICE

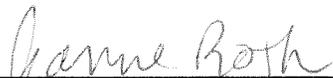
I hereby certify that on September 29, 2016, I caused the Brief of Respondent, Washington State Insurance Commissioner, and this Certificate of Service to be served, via U.S. mail, upon the parties herein, as indicated below:

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

DATED this 29<sup>th</sup> day of September, 2016.

  
\_\_\_\_\_  
JEANNE ROTH  
Legal Assistant