BEFORE THE STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

IN THE MATTER OF WASHINGTON COUNTIES INSURANCE FUND	Docket No. 15-0034 WASHINGTON COUNTIES INSURANCE FUND'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO OIC STAFF'S CROSS MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The Office of the Insurance Commissioner ("OIC") moves for summary judgment as to its January 15, 2015 rejections ("the Rejections") of the 2014 rate filings ("the Filings") of Premera Blue Cross ("Premera") and Group Health Cooperative ("Group Health") (collectively, "the Carriers").[1] But nowhere in the OIC Staff's Response to Motion for Summary Judgment and Cross Motion for Summary Judgment ("OIC's Cross Motion") does the OIC point to the elusive "new" law supporting its abrupt change in position regarding the ability of associations to set rates at the Participating Employer level. Rather, the OIC vaguely asserts that the Affordable

[1] WCIF hereby clarifies that it appeals all four of the Rejections pertinent to Premera's and Group Health's Filings on behalf of WCIF.

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Care Act ("ACA") suddenly mandates that associations cannot do so, without citing to any provision of the ACA that so provides. To the contrary, the OIC's Rejections are without basis in state or federal law, and WCIF respectfully requests that they be reversed as a matter of law.

II. BACKGROUND

WCIF incorporates its discussion from the "Background" section contained in its Motion for Summary Judgment as if set forth in full herein.

III. STANDARD OF DECISION

Summary judgment in an administrative proceeding is appropriate "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." WAC 10-08-135; *see also Stewart v. Dep't of Soc. & Health Servs.*, 162 Wn. App. 266, 270, 252 P.3d 920 (2011). All facts are viewed "in the light most favorable to the nonmoving party." *Granton v. Wash. State Lottery Comm'n*, 143 Wn. App. 225, 230, 177 P.3d 745 (2008).

Here, the Parties agree that this matter presents legal issues that would be decided most efficiently via dispositive motions. *See* Prehearing Conference Order at 2; OIC's Cross Motion.

IV. ARGUMENT

A. WCIF Has Standing to Challenge the OIC's Decisions

Contrary to the OIC's assertion, WCIF has standing to demand this hearing. RCW 48.04.010(1)(b) provides:

> Except under RCW 48.13.475,[2] 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] RCW 48.13.475 pertains to the safeguarding of securities and is inapplicable here.

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(Emphases added). WCIF is a party aggrieved by an act of the Commissioner; as such, it has standing under the only standing provision applicable here: the above-quoted RCW 48.04.010(1)(b).

The OIC argues that only the Carriers have standing to challenge the Rejections.[3] But that is not what RCW 48.04.010(1)(b) provides. Had the Legislature intended to limit demands for a hearing to carriers, it could have done so. Instead, it provided that "any person aggrieved by any act" of the OIC has the right to be heard. RCW 48.04.010(1)(b) (emphasis added).

1. RCW 48.44.020(2) and RCW 48.46.060(3) Do Not Limit WCIF's Right to a Hearing

The OIC asserts that RCW 48.44.020(2) and RCW 48.46.060(3) limit standing to the carriers. The former provides:

> The commissioner may on examination, subject to the right of the health care service contractor to demand and receive a hearing under chapters 48.04 and 34.05 RCW, disapprove any individual or group contract form for any of the following grounds: . . .

RCW 48.44.020(2) (emphasis added). Similarly, RCW 48.46.060(3) provides:

> Subject to the right of the health maintenance organization to demand and receive a hearing under chapters 48.04 and 34.05 RCW, the commissioner may disapprove any individual or group agreement form for any of the following grounds: . . .

(Emphasis added).

The OIC's reasoning is fundamentally flawed because it did not rely on any of the grounds cited in RCW 48.44.020(2) or RCW 48.46.060(3) in its Rejections of the Filings. *See* Declaration of Jon Kaino in Support of Washington Counties Insurance Fund's Motion for Summary Judgment (03/31/15) ("First Kaino Decl."), Exs. 15-18. Rather, the OIC rejected the Filings under RCW 48.44.020(3) and RCW 48.46.060(4), which provide that "the commissioner

[3] The OIC has erroneously stated that "[n]either carrier challenges the disapproval of its rate filing." OIC's Cross Motion, p. 1. In fact, Premera Blue Cross filed a Demand for Hearing on April 14, 2015 as to its Association Health Plan filings, including its filings on behalf of WCIF. *See* http://www.insurance.wa.gov/laws-rules/administrative-hearings/judicial-proceedings/documents/15-0113-demand.pdf (last visited May 14, 2015).

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may disapprove any contract if the benefits provided therein are unreasonable in relation to the amount charged for the contract." *See id.*; RCW 48.44.020(3); RCW 48.46.060(4). Neither RCW 48.44.020(3) nor RCW 48.46.060(4) contain the language to which the OIC now points.

Even if the OIC had relied on its Rejections on one of the grounds set forth in RCW 48.44.020(2) or RCW 48.46.060(3) (which it did not), the language of those provisions would not preclude WCIF's demand for a hearing. Nothing in those provisions states that parties other than the Carriers no longer have appeal rights under RCW 48.04.010(1)(b). The mere acknowledgement that the OIC's rejection of filings is "subject to the right of the health care service contractor [or health maintenance organization] to demand and receive a hearing" does not somehow extinguish other aggrieved parties' right to be heard. RCW 48.44.020(2); *see also* RCW 48.46.060(3). Indeed, RCW 48.04.010(1)(b) includes only one exception to the right to a hearing of "any person aggrieved by any act" of the Commissioner: where proceedings involving the safeguarding of securities under RCW 48.13.475 are involved. RCW 48.04.010(b) (emphases added). Significantly, RCW 48.04.010(1)(b) does not carve out an exception to the right to a hearing where the OIC rejects filings under RCW 48.44.020(2) or RCW 48.46.060(3) - neither of which are at issue with respect to the Rejections, at any rate. *See id.*

2. The APA Does Not Limit WCIF's Right to a Hearing

The OIC next asserts that WCIF does not qualify as "any person aggrieved by any act" of the Commissioner. *Id.* In so arguing, the OIC relies exclusively on case law interpreting the standing provision for judicial review of an agency decision set forth in the Administrative Procedure Act ("APA"): RCW 34.05.530. As the OIC implicitly acknowledges, the APA is not applicable here. *See* OIC's Cross Motion, p. 9 (admitting that "Title 48 RCW, does not define 'aggrieved,'" and noting only that the APA's standing test is "instructive.") The Chief Presiding Officer with the OIC Hearings Unit soundly rejected application of the APA's standing test on summary judgment in a recent case addressing this issue:

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> . . . RCW 34.05.530 . . . 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 that act before this agency's (or any agency's) quasi-judicial executive tribunal such as this one. While . . . 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 on this case based on a statute which applies to an entirely different type of review, and based on case law interpreting that inapplicable statute.

In the Matter of Seattle Children's Hosp. & Coordinated Care Corp., Dkt. No. 13-0293, Order on Intervenors' Joint Motion for Summary Judgment (Feb. 20, 2014), p. 3 (emphases added).[4]

Even if the APA's standing test were applicable (which it is not), WCIF meets both prongs of that test. First, WCIF meets the "injury-in-fact" requirement, because the OIC's "action has prejudiced or is likely to prejudice" WCIF, its Participating Employers, and their Members.[5] RCW 34.05.530(1). If the carriers are required to set rates at the association level

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[4] *See* http://www.insurance.wa.gov/laws-rules/administrative-hearings/judicial-proceedings/documents/13-0293-order-intervenors-msj.pdf (last visited May 13, 2015).

[5] *See Am. Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 595, 192 P.2d 306 (2008):

> In addition to personal standing, a party may have standing in a representational capacity. . . . An organization "has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." . . .

(Internal citations omitted); *see also Nat'l Elec. Contractors Ass'n v. Employment Sec. Dep't*, 109 Wn. App. 213, 220-21, 34 P.3d 860 (2001) (holding that an "interest sufficient to confer standing may be shown in [a] personal or representative capacity") (internal citation omitted). Here, the Participating Employers and their Members are aggrieved parties in their own right, with standing to demand a hearing under RCW 48.04.010(1)(b). WCIF's purpose is to provide high-quality, affordable healthcare to Participating Employers' Members -- the same purpose WCIF is advancing by protesting the OIC's Rejections. *See* First Kaino Decl., ¶ 2; Second Kaino Decl., ¶ 2 Finally, "neither the claim asserted nor the relief requested requires the participation of individual members," as WCIF can effectively represent the interests of Participating Employers and Members. *Am. Legion Post No. 149*, 164 Wn.2d at 595, 192 P.2d 306.

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and thus impose the same rates on all Participating Employers, the rates assigned to many Participating Employers will increase substantially. First Kaino Decl., ¶ 17; Declaration of Jon Kaino in Support of Washington Counties Insurance Fund's Reply in Support of its Motion for Summary Judgment and Opposition to OIC Staff's Cross Motion for Summary Judgment ("Second Kaino Decl."), ¶ 3. Those Participating Employers with higher rates are likely to leave WCIF and obtain health insurance elsewhere. *Id.* WCIF will no longer be able to effectively compete for the provision of healthcare benefit plans to employers falling within a certain demographic. *Id.* Its membership will instead be limited to an aging demographic that will not be sustainable in the long term. *Id.* In addition, WCIF's per-member administrative costs will increase with reduced enrollment. *Id.* "The United States Supreme Court routinely recognizes probable economic injury resulting from agency actions that alter competitive conditions as sufficient to satisfy the injury-in-fact requirement." *Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council*, 129 Wn.2d 787, 794, 920 P.2d 581 (1996) (internal quotation marks and citation omitted); *see also Snohomish Cnty. Pub. Transp. Benefit Area v. Pub. Emp. Relations Comm'n*, 173 Wn. App. 504, 513, 294 P.3d 803 (2013) ("Economic losses, such as harm to competitive positioning in a commercial market . . . have consistently been recognized as injuries sufficient to establish standing." (internal quotation marks and citation omitted)). "The fact that any economic injury . . . may not be immediate . . . is not dispositive of the standing question . . .." *Seattle Bldg. & Constr. Trades Council*, 129 Wn.2d at 795. The prejudice caused by the OIC's Rejections is not speculative, but is a concrete burden directly imposed on WCIF, its Participating Employers, and their Members as a result of the OIC's requested remedy.

Second, WCIF meets the "zone of interest" requirement. "[A]lthough the zone of interest test serves as an additional filter limiting the group which can obtain judicial review of an agency

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decision,[6] the 'test is not meant to be especially demanding.'" *Id.* at 797 (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399, 107 S. Ct. 750 (1987)). "The test focuses on whether the Legislature intended the agency to protect the party's interests when taking the action at issue." *St. Joseph Hosp. & Health Care Ctr. v. Dep't of Health*, 125 Wn.2d 733, 739-40, 887 P.2d 891 (1995).

The OIC merely raises the vague assertion that "[n]one of the statutes bearing on the OIC's disapprovals were intended to benefit third party administrators such as WCIF . . .," without identifying the statutes to which it refers. OIC's Cross Motion, p. 10. As an initial matter, WCIF is not a third-party administrator. Second Kaino Decl., ¶ 2. Regardless, the only statutes relied upon by the OIC in its Rejections, RCW 48.44.020(3) and RCW 48.46.060(4), provide that "the commissioner may disapprove any agreement if the benefits provided therein are unreasonable in relation to the amount charged for the agreement." These provisions are clearly intended to protect the recipients of plan benefits - the very people who comprise the membership of WCIF's Participating Employers - from "benefits [that] . . . are unreasonable in relation to the amount charged" by the Carriers.[7] RCW 48.44.020(3); RCW 48.46.060(4).

Furthermore, the Washington courts, in applying the APA, have "adopted a more liberal approach to standing when a controversy is of substantial public importance, immediately affects significant segments of the population, and has a direct bearing on commerce, finance, labor, industry, or agriculture." *Am. Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 595, 192 P.2d 306 (2008) (internal quotation marks and citation omitted). This case presents just such a circumstance. Imposing the OIC's requested remedy will immediately affect thousands of public

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[6] Note that the "zone of interest" test applies to "judicial review of an agency decision" and is not even applicable to the analysis at hand, contrary to the OIC's assertion.

[7] To the extent the OIC attempts to rely on RCW 48.44.020(2) and RCW 48.46.060(3) (which are not applicable here), those provisions were also clearly drafted to protect recipients of benefits from issues such as "inconsistent, ambiguous, or misleading clauses," "deceptive advertising," and "unreasonable restrictions on the treatment of patients." RCW 48.44.020(2); RCW 48.46.060(3)

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employees in the State of Washington, impacting their healthcare options, with a direct bearing on commerce and labor. *See* First Kaino Decl., ¶¶ 3, 17; Second Kaino Decl., ¶ 3.

WCIF has a clear right to demand a hearing to seek reversal of Rejections that directly prejudice WCIF without any basis in state or federal law. Significantly, while the Presiding Officer is required to hold a hearing here, "upon written demand for a hearing made by any person aggrieved by any act . . . of the commissioner,"[8] the Presiding Officer also has the discretion to "hold a hearing for any purpose within the scope of this code as he . . . may deem necessary." RCW 48.04.010(1). WCIF respectfully asserts that even if it lacked standing, the circumstances presented in this case -- in which the health insurance benefits of thousands of public employees will be impacted -- warrant review by the Presiding Officer.

B. The OIC's Position Lacks Any Legal Basis

1. The OIC Has Improperly Shifted its Basis for the Rejections

In its Rejections, the OIC clearly cited to a single basis for its decisions: RCW 48.44.020(3) and the substantively identical RCW 48.46.060(4). First Kaino Decl., Exs. 15-18. Those provisions state that "the commissioner may disapprove any contract if the benefits provided therein are unreasonable in relation to the amount charged for the contract." RCW 48.44.020(3); RCW 48.46.060(4). The OIC's citation to RCW 48.44.020(3) and RCW 48.44.060(4) was not inadvertent. The OIC clearly expressed the following in the Rejections:

> . . . This tells us that your rates, filed for various employers, are unreasonable in relation to the amount charged for the contract for one single employer,[9] the Washington State Association of Counties. Therefore, your rate and form filings are disapproved and closed under the authority of RCW 48.44.020(3).

First Kaino Decl., Ex. 15 (emphasis added); *see also id.* at Exs. 17-18 (including identical language, with the exception of the substitution of RCW 48.46.060(4)).

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[8] RCW 48.04.010(1)(b); WAC 284-02-070(b).

[9] As discussed in WCIF's Motion for Summary Judgment, the OIC altered the language of RCW 48.44.020(3) and RCW 48.46.060(4) in its Rejections, but it is clear that it intended to rely solely on those provisions.

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As discussed in WCIF's Motion for Summary Judgment, RCW 48.44.020(3) and RCW 48.46.060(4), the sole provisions on which the OIC relied in its Rejections, are completely inapplicable to the circumstances. Those provisions allow for disapproval of a contract "if the benefits provided therein are unreasonable in relation to the amount charged for the contract." RCW 48.44.020(3); RCW 48.46.060(4) (emphasis added). The OIC does not claim that the benefits provided under the Plans are unreasonable. Rather, the OIC asserts that the rates are somehow unlawful.

In a tortured attempt to justify its reliance on RCW 48.44.020(3) and RCW 48.46.060(4), the OIC asserts that "it is impossible to evaluate a plan's benefits in relationship to its rates by considering only one side of the equation and without evaluating both the rates and benefits." OIC's Cross Motion at 23. But the OIC's argument only highlights that "benefits" and "rates" are not synonymous. While the OIC may consider rates in connection with its analysis of whether "benefits provided therein are unreasonable," the clear language of RCW 48.44.020(3) and RCW 48.46.060(4) only permits rejection on the basis of one of those factors: the benefits. [10] The OIC has not raised any concerns regarding the reasonableness of the Plans' benefits.

Indeed, the OIC implicitly acknowledges the complete inapplicability of its sole cited basis for the Rejections, as it instead relies on completely different bases under federal law in its Cross Motion. In another contrived effort to salvage its position, the OIC suddenly points to

[10] The OIC also suggests that WCIF has somehow not met its burden to demonstrate that the actuarial requirements of WAC 284-43-915(2) have been met. OIC's Cross Motion at 24. WAC 284-43-915 provides that "[b]enefits will be found not to be unreasonable if the projected earned premium for the rate renewal period is equal to" specified actuarially sound estimates and provisions. Any purported burden to prove that the actuarial requirements were met was never triggered because the OIC's basis for its Rejections was not the contention that the Plans' benefits were unreasonable. Thus, WAC 284-42-915 is completely inapplicable (as are the statutes on which the OIC expressly relied). WCIF's point in including WAC 284-43-915(2) in its Motion for Summary Judgment was to underscore the fact that RCW 48.44.020(3) and RCW 48.44.060(4) are inapplicable. The actuarial requirements of WAC 284-43-915(2) highlight that RCW 48.44.020(3) and RCW 48.44.060(4) apply to an analysis of the reasonableness of the benefits, not to an analysis of whether an association may assess rates at the Participating Employer level.

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entirely different provisions from those cited in its Rejections, attempting to now rely on RCW 48.44.020(2)(f), which provides:

> The commissioner may on examination . . . disapprove any individual or group contract form for any of the following grounds:
>
> . . . (f) If it fails to conform to minimum provisions or standards required by regulation made by the commissioner pursuant to chapter 34.05 RCW.

The OIC similarly relies on RCW 48.46.060(3)(e), which provides:

> [T[he commissioner may disapprove an individual or group agreement form for any of the following grounds:
>
> . . . (e) If it is any respect in violation of this chapter or if it fails to conform to minimum provisions or standards required by the commissioner by rule under chapter 34.05 RCW.

See OIC's Cross Motion at 22. The OIC then points to WAC 284-43-125, which contains the general provision: "Health carriers shall comply with all Washington state and federal laws relating to the acts and practices of carriers and laws relating to health plan benefits." *See id.* at 23. Thus, the OIC ignores the statutory provisions cited in its Rejections and now offers the new argument that it instead rejected the Filings pursuant to entirely different provisions, under the vague premise that the carriers were required to "comply with all Washington state and federal law." WAC 284-43-125.

The OIC's ever-shifting position[11] is improper. Parties affected by an agency's decision should be entitled to rely on the reasons expressly articulated in the decision and to focus their challenge on those articulated reasons. At the very least, the OIC's inability to focus on any applicable law is telling. The OIC has been obligated to continuously change its course and to hide behind a shifting screen of justifications because there is no law prohibiting an association from rating at the Participating Employer level. Throughout its entire Cross Motion, not once

[11] Notably, in its Objection Letters, the OIC cited to federal law as to concerns it raised, but it then proceeded to reject the Filings on the basis of state provisions entirely unrelated to the Carriers' compliance with federal law. *See* First Kaino Decl., Exs. 1-3, 7-9, 15-18. Now, the OIC's arguments have again shifted back to purported concerns under federal law that are entirely unrelated to the provisions cited in the Rejections. *See id.* at Exs. 15-18.

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does the OIC point to a law or regulation that actually precludes the setting of rates at the Participating Employer level. That is because no such law or regulation exists.

2. The OIC's Position is Not Supported by Federal Law

As noted above, the OIC now asserts that its Rejections were premised on the following tortured path of logic: (1) the Rejections were not made pursuant to RCW 48.44.020(3) or RCW 48.46.060(4), the only provisions actually cited in the Rejections; (2) the Rejections were instead authorized by RCW 48.44.020(2)(f) and RCW 48.46.060(3)(e) (not cited in the Rejections), which allow rejection on the basis of failure to conform to standards required by the Commissioner pursuant to rule or regulation; (3) WAC 284-43-125 (also not cited in the Rejections) generally requires carriers to comply with federal law; and (4) therefore, the Rejections were grounded in federal law. Even if this winding path is followed to its conclusion, the OIC still cannot point to any federal law that actually prohibits rate-setting at the Participating Employer level.

The OIC's reasoning is instead based on a misapplication of federal law and on the fundamentally incorrect assumption that there has been a recent change in the law affecting associations' ability to set rates at the Participating Employer level. The OIC asserts that "new federal language specifically abolished any exemption from federally required community rating or from the other ACA small group market reforms for associations or small employers purchasing through associations." OIC's Cross Motion at 14. But the OIC fails to point to this purported "new federal language." It argues that WCIF must be treated as a single employer for rating purposes merely because the ACA has adopted the definition of "employer" found in Section 3(5) of the Employee Retirement Income Security Act ("ERISA"). Specifically, the ACA provides that carriers may sell "employee welfare benefit plans," as defined by ERISA, and that "employee welfare benefit plans" must be "established or maintained by an employer," which is defined in ERISA as including "a group or association of employers acting for an employer in such capacity." 42 U.S.C. § 1002(5). Absolutely nothing in the ACA or ERISA

require that an association must set its rates at the association level. The OIC has unilaterally determined that "identifying which entity is the employer" under ERISA is synonymous with "determining the level at which the plan exists" for purposes of rate-setting. OIC's Cross Motion at 16. But it cannot point to any legal justification for its position. The OIC is attempting to extend a concept from one context far beyond its intended boundaries and to force it into an entirely separate context on which the law is silent.

Moreover, none of the concepts on which the OIC now relies are new. The ACA merely pulled definitions into the statute that were already present in the federal regulations.[12] The Health Insurance Portability and Accountability Act ("HIPAA") non-discrimination provisions have been in place for a decade. Nothing has changed in the law to warrant a sudden change in the OIC's position as of January 1, 2014.

The OIC points to three sources of purported support for its position. Significantly, none of them are actual statutes or regulations prohibiting rate-setting at the Participating Employer level.

First, the OIC relies on a September 1, 2011 bulletin issued by the Centers for Medicare and Medicaid Services ("CMS"). *See* OIC's Cross Motion at 15-16 & Addendum A. Notably, this bulletin was from 2011, underscoring that there has been no sudden change in the law as the OIC claims. *Id.* at Addendum A. The "bona fide association" definition included in Public

[12] Health care reform extended HIPAA's health status nondiscrimination requirement to health insurance issuers offering individual health insurance coverage, effective January 1, 2014. *See* Section 2705(a) of the Public Health Service Act ("PHSA"), as added by Section 1201(4) of the ACA. The effective date for the provisions was in Section 1255 of the ACA. The health status-related factors are found in ERISA 702(1)(1); Code Section 9802(a)(1) and PHSA 2705(a). A "catch-all" category was added by ACA §1201(4), which was "any other health status-related factor determined appropriate by the Secretary of HHS." Notably, HHS could have -- but has not -- promulgated any rules regarding association plan rating. Certain programs of health promotion or disease (referred to as "wellness programs") are an exception to the general prohibition on discrimination based on a health status-related factor. Health reform codified the 2006 HIPAA regulations' nondiscrimination requirements for wellness programs, without significant changes apart from an increase in the maximum permissible reward. The codified rules are effective for plan years beginning on or after January 1, 2014. PHSA §2705(j), as amended by ACA.

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Health Service Act ("PHS") § 2791(d)(3), discussed in the CMS bulletin, provides some guidance, but does not affect the analysis of whether health insurance coverage belongs in the large or small group market for insurance regulatory requirements, including Federal Community Rating requirements. The OIC omits any mention that the very same CMS bulletin on which it relies expressly clarifies that, other than "for purposes of providing limited exceptions from its guaranteed issue and guaranteed renewability requirements," "[t]he bona fide association concept has no other significance under the PHS Act." *Id.* at 2 n.4 (emphasis added). Again, nothing in the CMS bulletin prohibits rate-setting at the Participating Employer level or points to any law or regulation that does so.

Second, the OIC points to the case of *Fossen v. Blue Cross Blue Shield of Montana, Inc.*, 744 F.Supp.2d 1096 (D. Mont. 2010). OIC's Cross Motion at 16-17. But *Fossen* does not provide a legal basis for the OIC's position. *Fossen*, decided by a federal court in Montana, is not binding on this proceeding and fails to offer helpful guidance. It pre-dated the ACA, involved a multiple employer welfare arrangement ("MEWA"), included, in the context of an ERISA preemption analysis, an analysis of a specific Montana state statute prohibiting discriminatory premiums, and involved a suit filed by the plan members against the carriers, none of which factors are at play in this case. Nor did *Fossen* hold that rates cannot be set at the Participating Employer level with respect to an association; instead, it merely held that the MEWA in that case could set rates on that basis. *Fossen*, 744 F.Supp.2d 1096.

Finally, the OIC points to an email it solicited from Doug Pennington with the Center for Consumer Information and Insurance Oversight ("CCIIO") in October 2014. OIC's Cross Motion at 19-20. CCIIO has absolutely no jurisdiction over the Filings at issue. Mr. Pennington's personal opinion, offered in tepid terms such as "it would appear to be inappropriate" and "it would seem inappropriate," without any citation to any legal basis for that position, add nothing to the legal analysis at hand. *Id.* (emphases added).

The OIC's position is without basis in the law. But even if a non-existent law required WCIF to be treated as the only employer for rate-setting purposes, the OIC's position ignores two critical points: (1) the HIPAA non-discrimination provisions prohibit only the assessment of different rates for similarly-situated individuals "based on any health factor that relates to the individual or a dependent of the individual;" and (2) "a plan may treat participants as two or more distinct groups of similarly situated individuals if the distinction between or among the groups of participants is based on a bona fide employment-based classification consistent with the employer's usual business practice." 26 C.F.R. § 54.9802-1(c)(1), (d)(1) (emphases added).

The OIC repeatedly argues, without any foundation in fact, that "both of the carriers in this case used the past claims history of the individual small employers to initially assign them to rate tiers." OIC's Cross Motion at 6; *see also id.* at 19 (asserting, without basis, that "the small employer members of the association are assigned to the risk tier based primarily on the claims experience of their employees.") The OIC's only basis for this erroneous assumption is the fact that "Premera acknowledged that participating employers 'were previously underwritten based upon their specific experience.'" *Id.* at 5 (emphasis added). The OIC therefore speculates that Participating Employers' 2014 rates were impacted by their previous rates, which previous rates took into account claims experience. *See id.* at 5-6. This assumption is simply not based in fact.

For purposes of the 2014 Filings, groups were run through the new 2014 rating model, which did not include any factors relating to individual or group health data or claims experience. Second Kaino Decl., ¶ 4. With respect to the Legacy Groups (those Participating Employers that purchased benefit plans through WCIF prior to January 1, 2014), the new 2014 rating model assigned all of those Participating Employers to very same risk level (Level 15). *Id.* It would have been statistically impossible for all 68 Legacy Groups to arrive at the same risk level had Participating Employers' separate claims experience been utilized to set the rates. *Id.* The only Participating Employers assigned to different risk levels other than Risk Level 15 were the non-Legacy Groups. *Id.* Neither WCIF nor the carriers possessed any claims experience

data for those non-Legacy Groups. *Id.* While the OIC may be attempting to devise an issue of fact on this point, its assumption that claims experience drove the rate assignments is simply not based in reality, and the OIC cannot point to any actual facts in support of its speculation. Individual health factors did not factor into the rates at issue, and thus the HIPAA non-discrimination provisions do not apply.

Furthermore, the OIC fails to address WCIF's argument that the Participating Employers constitute permissible "distinct groups of similarly situation individuals . . . based on a bona fide employment-based classification." 26 C.F.R. § 54.9802-1(d)(1). Instead, the OIC brushes over this point, assuming that there must be an additional "employment based classification" beyond status as an employee of an entirely separate Participating Employer. But if factors such as "membership in a collective bargaining unit" or "different geographic location" are sufficient to constitute "employment based classifications,"[13] then membership as an employee of a separate Participating Employer, located at that Participating Employer's separate place of business, is an even more clear "employment based classification."[14] Thus, employees of different Participating Employers need not be treated identically under the express terms of the HIPAA non-discrimination provisions. *See id.*

D. The OIC's Policy Arguments Are Inaccurate and Irrelevant

The OIC's Cross Motion is replete with policy arguments intended to garner sympathy for its position and to cloud the legal issues. *See, e.g.,* Declaration of Jim C. Keogh in Opposition to WCIF's Motion for Summary Judgment and in Support of OIC Staff's Cross

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[13] 26 C.F.R. § 54.9802-1(d)(1).

[14] The OIC contends, without any support in the record, that "two identically situated plan participants with the same job classification, collective bargaining unit, geographic location, and hours may pay widely divergent rates for the same benefit package." OIC's Cross Motion at 19. This is demonstrably false. A collective bargaining unit is, by necessity, a unit involving employees from a single Participating Employer. Similarly, job classifications are employer-specific. Because all employees of a Participating Employer are assigned to the same Risk Level, similarly situated employees in the same collective bargaining unit and same job classifications cannot be charged the "widely divergent rates" that the OIC claims. There is no situation in the Plans where the above could occur. Second Kaino Decl., ¶ 5.

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Motion for Summary Judgment ("Keogh Decl."). Many of the "facts" on which its policy arguments are based are simply not accurate as applied to these circumstances. For example, the OIC asserts that "for association health plans, enrollees over 50 make up less than 20% of their demographic," which the OIC contends "implies that employers with a significant number of employees over 50 are being priced out of the association health plan market." *Id.* at ¶ 10. In fact, 38.8% of Members insured through WCIF are over the age of 50, far exceeding the average of 25% for the small group market. Second Kaino Decl., ¶ 6; *see* Keogh Decl., ¶ 10 and Ex. A, Chart 3. Similarly, the OIC contends that "for association health plans, older enrollees were charged as much as 8 times what the youngest enrollees in a plan were charged." Keogh Decl., ¶ 8. The largest difference in rates for any WCIF plan is 2.34 to 1, and none of those rate variances are based upon individual age. Second Kaino Decl., ¶ 7. Even if they were, those variances would still be less than the 3 to 1 age banding variances present in the exchange or the small group market. *Id.*; *see* Keogh Decl., ¶ 8 and Ex. A, Chart 1. As these examples demonstrate, the Plans provided through WCIF are not the inequitable constructions the OIC tries to depict. Most importantly, the rates associated with those Plans do not, as the OIC suggests without basis, utilize any health factors. Second Kaino Decl., ¶ 4; First Kaino Decl., ¶ 6.

While the OIC's inaccurate policy arguments are disconcerting, the fact remains that they are simply irrelevant to the legal issue at hand: whether an association may set rates at the Participating Employer level. No amount of policy arguments can obfuscate the simple fact that the OIC's Rejections have no actual legal foundation.

E. The OIC Lacks the Authority to Impose its Proposed Remedy

The OIC completely fails to address WCIF's point that the OIC lacks the authority to impose its proposed remedy. As discussed in WCIF's Motion, the OIC's Rejections of the Carriers' 2014 Filings cannot support a mandate that Members be transitioned off of their 2015 Plans, which the OIC has not rejected.

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F. The Declaration of Charles Brown is Untimely, Incomplete, and Irrelevant

The Presiding Officer's Prehearing Conference Order of March 5, 2015 provided that all documents filed in response to WCIF's dispositive motion were required to be filed by April 29, 2015. *See* Prehearing Conference Order, p. 2. While the majority of the OIC's responsive materials were timely filed, the OIC submitted the Declaration of Charles Brown ("Brown Decl.") on May 18, 2015, 19 days late and on the very eve of the date on which WCIF's reply brief was due. *See id.*; Brown Decl. Furthermore, the Declaration did not include a copy of one of the exhibits referenced in the body of the Declaration.[15] *See* Brown Decl. The Brown Declaration is untimely and incomplete and should therefore not be considered in the Presiding Officer's assessment of the parties' cross motions.

Regardless, the Brown Declaration adds nothing to the OIC's argument. It attaches a February 4, 2013 opinion letter from the Attorney General of Washington (the "Opinion Letter"). The Opinion Letter, to the extent it is even relevant, actually underscores WCIF's position. Notably and conspicuously absent from the Opinion Letter's exhaustive recitation of the state statutes and regulations that define the OIC's scope of authority to review plans and rates was any mention of any statute or regulation that provides OIC with the authority to reject association plan filings based on the plans' use of multiple Risk Levels applied at the Participating Employer level. That is because there is no such statute or regulation. The OIC was clearly aware of the limits of its authority when it proposed WAC 284-170-958 in June 2013 - after soliciting and receiving the Opinion Letter. As proposed, WAC 284-170-958 originally included a provision that arguably would have prohibited an association health plan from utilizing the rating methodology used by the Plans, and would have granted the OIC the authority to reject the filings on that basis. Significantly, however, the OIC ultimately chose not to include that provision in the final regulation. There simply is no law to support the OIC's position.

[15] The copy of the Brown Declaration served on WCIF is missing "Exhibit 2."

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V. CONCLUSION

For the reasons set forth above, as well as the reasons articulated in WCIF's Motion for Summary Judgment, WCIF respectfully requests that the OIC's Rejections be overturned and that the 2014 rate and form Filings be approved by the OIC.

Dated this 19th day of May, 2015.

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CERTIFICATE OF SERVICE

I, Juli Waldschmidt, certify under penalty of perjury under the laws of the State of Washington that, on May 19, 2015, I caused the foregoing document to be served on the persons listed below in the manner shown:

Judge George Finkle (Ret.)
Presiding Officer
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Dated this 19th day of May, 2015, at Seattle, Washington.

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FILED

2015 MAY 19 P 3:44

BEFORE THE STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

IN THE MATTER OF WASHINGTON COUNTIES INSURANCE FUND	Docket No. 15-0034 DECLARATION OF JON KAINO IN SUPPORT OF WASHINGTON COUNTIES INSURANCE FUND'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO OIC STAFF'S CROSS MOTION FOR SUMMARY JUDGMENT

1. I am the Executive Director of the Washington Counties Insurance Fund ("WCIF"), a position I have held since June 1, 2012. I am above the age of 18 and competent to testify to the matters set forth herein.

2. WCIF is a multi-employer non-profit trust fund formed in the 1950s by the Washington State Association of Counties for the purpose of providing high-quality, affordable healthcare plans to public employers and publicly-funded non-profit employers ("Participating Employers") for their employees and employees' eligible dependents ("Members"). WCIF is not a third-party administrator.

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3. If Premera Blue Cross and Group Health Cooperative ("the Carriers") are required to set rates at the association level and thus impose the same rates on all Participating Employers in WCIF, the rates assigned to many Participating Employers will increase substantially. Imposing the Office of the Insurance Commissioner's ("OIC's") requested remedy will immediately affect thousands of public employees in the State of Washington, impacting their healthcare options. Those Participating Employers with higher rates are likely to leave WCIF and obtain health insurance elsewhere. WCIF will no longer be able to effectively compete for the provision of healthcare benefit plans to employers falling within a certain demographic. Its membership will instead be limited to an aging demographic that will not be sustainable in the long term. In addition, WCIF's per-member administrative costs will increase with reduced enrollment.

4. For purposes of the Carriers' 2014 Filings on behalf of WCIF, groups were run through the new 2014 rating model, which did not include any factors relating to individual or group health data or claims experience. With respect to the Legacy Groups (those Participating Employers that purchased benefit plans through WCIF prior to January 1, 2014), the new 2014 rating model assigned all of those Participating Employers to very same Risk Level (Level 15). There were 68 Legacy Groups, and it would have been statistically impossible for all of those Groups to arrive at the same Risk Level had Participating Employers' separate claims experience been utilized to set the rates. The only Participating Employers assigned to different Risk Levels other than Risk Level 15 were the non-Legacy Groups. Neither WCIF nor the Carriers possessed any claims experience data for those non-Legacy Groups. Individual health factors did not factor into the rates at issue.

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5. The OIC contends that "two identically situated plan participants with the same job classification, collective bargaining unit, geographic location, and hours may pay widely divergent rates for the same benefit package." There is no situation in the Plans offered through WCIF where the above could occur. A collective bargaining unit is, by necessity, a unit involving employees from a single Participating Employer. Similarly, job classifications are employer-specific. Because all employees of a Participating Employer are assigned to the same Risk Level, similarly situated employees in the same collective bargaining unit and same job classifications cannot be charged the "widely divergent rates" that the OIC claims.

6. 38.8% of Members insured through WCIF are over the age of 50, far exceeding the average cited by the OIC of 25% for the small group market.

7. The largest difference in rates for any WCIF plan is 2.34 to 1, and none of those rate variances are based upon individual age. Even if they were, those variances would still be less than the 3 to 1 age banding variances present in the Exchange or the small group market.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED at Seattle, Washington this 19th day of May, 2015.

JON KAINO

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CERTIFICATE OF SERVICE

I, Juli Waldschmidt, certify under penalty of perjury under the laws of the State of Washington that, on May 19, 2015, I caused the foregoing document to be served on the persons listed below in the manner shown:

Judge George Finkle (Ret.)
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