BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

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HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER

In the Matter of:	Docket No. 15-0166
FIRST AMERICAN TITLE INSURANCE COMPANY,	**ORDER ON THE PETITIONS FOR RECONSIDERATION FILED BY THE OIC AND FIRST AMERICAN**
Authorized Title Insurer.	

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1. ***Background.***

On May 4, 2014, 2016, I entered Findings of Fact, Conclusions of Law, and Final Order ("Final Order") in this matter. On May 13, 2016, the Office of the Insurance Commissioner ("OIC") timely filed[1] with the OIC's Hearings Unit "OIC's Request for Reconsideration of the [Final Order]" ("OIC's Petition")(Brackets added). On May 16, 2016, First American Title Insurance Company ("First American") timely filed with the OIC's Hearings Unit "[First American's] Motion for Reconsideration, or, in the Alternative, to Amend/Alter the [Final Order]"("First American's Petition")(Brackets added). For the reasons below I deny the Petitions of both OIC and First American.

[1] See RCW 34.05.470(1)

2. ***OIC's Petition.***

In ¶2 of its Petition the OIC states: "Nothing in RCW 48.05.185 alters the number of violations that the Insurance Commissioner may consider under RCW 48.05.140; each occurrence of a violation justifies either suspension, revocation, and/or the imposition of a fine." As explained at page 18 of the Final Order, RCW 48.05.140 simply states, among other things, that the Commissioner may suspend or revoke an insurer's certificate of registration of authority if the insurer fails to comply with any provision of RCW Title 48 (i.e., the insurance code), order or regulation of the Commissioner, refuses to be examined, or fails to produce accounts, records, and files for the Commissioner's examination. In lieu of the Commissioner taking action under RCW 48.05.140, following a hearing, RCW 48.05.185 authorizes the Commissioner to levy a fine of at least $250, but no greater than $10,000. Unlike other instances in the insurance code listed on Page 19 of the Final Order that allow a fine or penalty to be imposed on a per violation or per offense basis, RCW 48.05.185 clearly does not include such language. Whether this legislative omission was deliberate or inadvertent, the Washington Supreme Court recently opined in *State v. Reis*, 183 Wn.2d 197, 214-215, 217, 351 P.3d 127 (2015), on the inability of the courts to correct perceived legislative omissions, and stated in relevant part:

> Indeed, this situation is analogous to a legislative omission, a situation in which we have long recognized that
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> > we do not have the power to read into a statute that which we may believe the legislature has omitted, be it an intentional or an inadvertent omission. ... [I]t would be a clear judicial usurpation of legislative power for us to correct that legislative oversight.
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> *State v. Martin*, 94 Wn.2d 1, 8, 614 P.2d 164 (1980). <u>It is not this court's job to remove words from statutes or to create judicial fixes, even if we think the legislature would approve</u>. Statutes that frustrate the purpose of others, though perhaps unintentionally, are "purely a legislative problem." *State ex rel. Hagan v. Chinook Hotel, Inc.*, 65 Wn.2d 573, 578, 399 P.2d 8 (1965).
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> * * *
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> But even if we believed that the governor overlooked these particular references, we do not have the power to edit the language of the enacted statute. In exercising the veto power, the governor is acting in a legislative capacity. *Shelton Hotel Co.*, 4 Wn.2d at 506. <u>This court does not have the authority to read language out of a statute, even when we believe that the statute contains errors or inadvertent omissions</u>. *Cf. Martin*, 94 Wn.2d at 8 (court does not have the power to "read into a statute that which we may believe the legislature has omitted, be it an intentional or an inadvertent omission"). . . . <u>We instead must limit our interpretation to the enacted statute</u>;

(Emphasis added).

The statement in the Final Bill Report for SSB 6847 indicating that the OIC may fine title companies $10,000 for each violation, included in the portion of that Report I cite at page 9 of the Order, is not included in the language of RCW 48.05.185 (i.e., the enacted statute), to which under *Reis* I must limit my interpretation. The decision in *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 100 S. Ct. 800, 63 L.Ed.2d 36 (1980), cited by the OIC in ¶3 of its Petition as support for its position that RCW 48.05.185 authorizes a penalty/fine on a per violation/offense basis, is distinguishable from the facts herein because in *Seatrain* Congress enacted subsequent legislation amending legislation passed by an earlier Congress. Here, we simply have the Bill Report for legislation not amending RCW 48.05.185 that makes passing reference to imposition of a fine of $10,000 for each violation. Unlike the mention at page 596 of *Seatrain*, we have no subsequent legislative views entitled to "significant weight" in interpreting an obscure statute. Instead, the legislature last amended RCW 48.05.185 in 1980, the instance of the last legislative views on fines against insurers.

At ¶5 of its Petition, the OIC asserts that it has interpreted its fine authority under RCW 48.05.185 consistently for more than 20 years, and consistently enforced penalties against insurers on a per violation basis. The OIC then remarks that the OIC's application of RCW 48.05.185 on a per violation basis has never been successfully challenged, and in *Chicago Title Ins. Co.*, 178 Wn.2d 120, 309 P.3d 372 (2013), the Court upheld the OIC's application of RCW 48.05.185. However, to the contrary, at 178 Wn.2d at 131, n.6., of *Chicago Title*, the Court simply acknowledged that on October 5, 2009, while the petition for judicial review was pending, the OIC and Chicago Title Insurance Company ("Chicago Title") entered into a stipulation and agreement that Chicago Title violated former WAC 284-30-800, and settled in full phase II of the action before the Court. The Court never reached the question of the OIC's imposition of fines in that matter. Rather, in *Chicago Title* the Court only addresses whether Chicago Title was liable for the actions of its agent.

At ¶6 of its Petition, the OIC asserts that its interpretation of RCW 48.05.185, that this provision allows it to fine an insurer on a per violation basis, is entitled to deference, and cites several cases for that position. In *Seattle-King County Council of Camp Fire v. Dep't of Revenue*, 105 Wn.2d 55, 711 P.2d 300 (1985), the Court explained that the Legislature was aware of the Department of Revenue's construction of the statute in question when it passed amendments to that statute in two successive sessions, but did not repudiate that construction. The Court in *Seattle-King County Council* found this significant and quoted from *Hart v. Peoples Nat'l Bank*, 91 Wn.2d 197, 201, 588 P.2d 204 (1978) and other cases stating:

> <u>Where a statute is ambiguous</u>, construction placed upon it by the officer or department charged with its administration is not binding on the courts but is entitled to considerable weight in determining the legislative intention, <u>and the persuasive force of such interpretation is strengthened when the legislature, by its failure to amend or by amending some other particular without repudiating the administrative construction, silently acquiesces in the administrative interpretation</u>. White v. State, 49 Wn.2d 716, 306 P.2d 230 [1957].

105 Wn.2d at 66 (emphasis added).

Unlike the statute at issue in *Seattle-King County Council*, RCW 48.05.185 is not ambiguous. It clearly states, among other things, that following a hearing, and in lieu of suspending or revoking any insurer's certificate of authority, the OIC may impose a fine on an insurer of at least $250, and no more $10,000. In the *Chicago Title* litigation mentioned above, the OIC and Chicago Title settled the fine part of that suit, outside of the realm of both the courts and the legislature. RCW 48.05.185 was last amended in 1980. Unlike in *Seattle-King County Council*, there is no evidence that the legislature, aside from the mention in the Final Bill Report for SSB 6847 indicating that the OIC may fine title companies $10,000 for each violation, has acquiesced to the OIC's longstanding administrative interpretation of RCW 48.05.185.

Unlike in *Retail Store Employees Union, Local 1001 v. Washington Surveying and Rating Bureau*, 87 Wn.2d 887, 898, 558 P.2d 215 (1976), which the OIC cites at ¶6 of its Petition, the Court may not place greater reliance than usual upon the OIC's administrative statutory interpretation of RCW 48.05.185, since the Commissioner has not been entrusted with "very broad discretion" in administering that statute. Rather, as I state at page 21 of the Final Order the Court stated in *In the Matter of Case E-368* (or *Arnett v. Seattle General Hosp.*), 65 Wn.2d 22, 29, 395 P.2d 503 (1964): "Administrative agencies have considerable latitude to shape their remedies <u>within the scope of their statutory authority</u>." (Emphasis added). To reiterate, RCW 48.05.185 permits the Commissioner, following a hearing, to fine an insurer between $250 and $10,000. The Commissioner must exercise his discretion within those parameters. The OIC's so-called longstanding practice of imposing fines on insurers under RCW 48.05.185 on a per violation basis (e.g., $10,000 per violation) is not entitled to deference. The proper interpretation of the language of RCW 48.05.185 is "purely one of law, which is not accorded the typical deference as an agency's interpretation of its own policy-making authority." *Hunter v. The Univ. of Washington*, 101 Wn. App. 283, 291 n.3, 2 P.3d 1022 (2000). Rather than establishing, altering, or revoking any requirement concerning the enjoyment of benefits conferred by RCW 48.05.185, as the OIC's passing reference at ¶7 of its Petition to the definition of "rule" in RCW 34.05.101(16) suggests, the Final Order's interpretation of RCW 48.05.185 is consistent with the law outlined both in the Final Order and above.

For the foregoing reasons, the OIC's Petition is denied.

3. ***<u>First American's Petition.</u>***

A. Scope of Legal Issues Addressed in the Final Order

WAC 284-02-070(1)(a) states: "Hearings of the OIC are conducted according to chapter 48.04 RCW and chapter 34.05 RCW, the Administrative Procedure Act." WAC 284-02-070(2)(a) adds: "Provisions applicable to adjudicative proceedings are contained in chapter 48.04 RCW and chapter 34.05 RCW, the Administrative Procedure Act, and chapter 10.08 WAC."

At 3:8-11 of its Petition, First American erroneously refers to the "Notice of Request for Hearing for Imposition of Fine" ("Application"), which the OIC filed with the OIC's Hearings Unit on

December 15, 2015, as the Notice of Hearing in this adjudicative proceeding. At 3:12-4:11 of its Petition, First American argues that the Presiding Officer made conclusions on regulatory provisions in the Final Order which "First American had no notice, opportunity, or obligation to defend," because the OIC did not allege violations of those in its Application. However, subsequent to the Application, on January 5, 2016, I issued a Notice of Hearing in this matter. The Notice of Hearing clearly summarizes the purpose of the two day hearing that occurred in this matter, and the scope of issues to be addressed, in part stating at pages 6-7: "The purpose of the hearing is to consider whether a fine should be levied against First American for alleged violations of RCW 48.29.210(2) and regulations in WAC Ch. 284-29 concerning trade association events."

RCW 34.05.434 governs the notice of hearing for adjudicative proceedings before an agency, issued by the hearings officer for such agency. RCW 34.05.434(1) states that the "agency shall set the time and place of the hearing. . . ." RCW 34.05.434(2) indicates that such notice shall include, among other things: "(g) A reference to the particular sections of the statutes and rules involved." WAC 10-08-130(3) outlines the parties' ability to object to a notice of hearing issued in an adjudicative proceeding, and the timeframe to do so, and states in relevant part:

> Following the prehearing conference, the presiding officer shall issue an order [notice of hearing] reciting the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties concerning all of the matters considered. <u>If no objection to such notice is filed within ten days after the date such notice is mailed, it shall control the subsequent course of the proceeding unless modified for good cause by subsequent order</u>.

(Emphasis added).

First American never objected to the Notice of Hearing I issued under WAC 10-08-130(3) and its description at pages 6-7 of the purpose of the subsequent hearing in this matter. In fact, at 1:15-22 of the Hearing Brief ("Brief") First American filed in this matter on March 22, 2016 with the OIC's Hearing Unit prior to the hearing, First American states that the OIC requested the hearing and submitted the Application:

> . . . because the OIC claims that First American co-sponsored the [Event] in a way which violated the OIC's regulations for such activities. <u>First American has not violated any statute or regulation. Substantial documentary and testimonial evidence adduced at the hearing will establish First American acted lawfully in connection with this [Event]</u>.

(Brackets and emphasis added). First American's own characterization of the purpose of the hearing in this matter in its Brief is to show that it acted lawfully in connection with the Event, and complied with *all* statutes and regulations applicable to its activities surrounding the Event. Additional passages from its Brief confirm this, and stress the need for a Final Order to be issued by the OIC clarifying the application of the regulations in WAC Ch. 284-29 to business practices of title companies.

At 5:18-6:12 of its Brief, First American addresses directly the entire regulatory structure governing unlawful inducements in the title insurance industry in WAC Ch. 284-29, and the void left because the OIC has issued no quasi-judicial decision clarifying those regulatory provisions, stating in part:

> In 2008 the Legislature passed a new statute which was codified as RCW 48.29.210 entitled "Business Inducements – Prohibits (sic) Practices." The new statute consisted of two sentences. WACs 284-29-100 *et. seq.* were adopted in 2009 to implement the new statute.
>
> The new regulations were the subject of substantial industry concern and confusion during the rule-making process. Voluminous comments from industry members were submitted to the [OIC] in connection with the [OIC's] rule-making activities. Many concerns were expressed regarding the interpretation of these rules. After the rules were adopted, industry members continued to express great concern over the lack of clarity of the regulations. This ongoing confusion caused the Department to separately post further interpretations and explanations of its regulations on its website. *See* www.insurance.law.gov/forproducers/title-insurance/inducementrules/event. Confusion still remains in the industry about how these rules will be interpreted and applied in certain circumstances. [FN 3]
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> [FN 3] By public records requests dated February 3, 2016, First American requested the OIC produce all written communications within the last five (5) years relating to OIC's interpretation of WAC 284-29-200 through 265. In response, several hundred pages of clarification/interpretations of these rules were produced in response for a request for clarifications, some as recently as January of this year. Confusion and uncertainty as to the application of the regulations continues to exist under certain circumstances.
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> . . . [B]ased upon the OIC's response to First American's Request for Public Records, it appears that there has never been a contested hearing interpreting the regulations at issue in this case. [FN 4].
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> [FN 4] Although a few "consent orders" are of record, these do not comprise resolution of a contested case after presentation of evidence and a determination by a neutral party. Rather if anything, they evidence ongoing confusion and/or agreed settlement compromises between the parties.
>
> Therefore, no quasi-judicial interpretation of the regulations which might provide further clarity has occurred.

(Brackets and emphasis added).

At 4:7-11 of its Petition, First American alleges that the only portion of WAC 284-29-220 which the OIC alleged to have been violated in its Application was subsection (2), and therefore asserts that findings and conclusions in the Final Order as to subsection (5) of that provision are not a proper subject of the Final Order. First American makes the same argument with reference to

WAC 284-29-260(7). To reiterate, the Notice of Hearing I issued, not the Application, is what controlled the subject matter of the hearing conducted in this matter. Regardless, far from objecting to the scope of the Notice of Hearing, which it could have done, in its Brief First American welcomed the opportunity to assert that its involvement with the Event fully complied with all applicable OIC regulations, including WAC 284-29-200(5)(b)(i) and WAC 284-29-260(7).

At 7:19-9:5 of its Brief, First American directly addresses the $1000 limit on things of value located in WAC 284-29-220(5)(b)(i), and argues that its employee time spent on the Event did not factor into whether that limit was exceeded, because all time its employees spent on the Event was in the context of donating title company employee time to a committee per WAC 284-29-220(1), and that it has safeguards in place to guarantee that its co-sponsorship of the Event and other trade association events complies with all applicable statutes and regulations, and states in part:

> A secondary allegation made . . . is that First American violated the regulation which limits the amount that an insurer can spend to sponsor a trade association event to $1,000 [WAC 284-29-220(5)(b)(i)]. Evidence will show that this allegation is also wrong. The [Event] held on October 16, 2014 was a trade association event. Regulations for such event are governed by WAC 284-29-220. First American is an affiliate member of SCCAR. Sara Christensen is a designated representative for the Company's affiliate membership. WAC 284-29-220(1) expressly exempts time donated to a trade association on committee related matters. Sara Christensen was part of an *ad hoc* committee that put on this [E]vent. The OIC has repeatedly confirmed that time expended on any kind of trade association committee is exempt from wage calculations. The OIC has never opined that an affiliate member cannot donate time to a trade association to which it belongs. None of Ms. Christensen's time is includible in the calculation of costs expended by First American to co-sponsor the [Event] based upon OIC's own rule [WAC 284-29-220(1)]. But even ignoring this exemption, evidence will show that Christensen's time was minimal [FN 6] and even if included and aggregated with the cost of the venue, the total amount of contribution did not exceed $1,000.
>
> [FN 6] Sara Christensen will testify that she spent 1 to [1.5] hours coordinating the event. Jayme Tooze expended no more than 45 minutes.
>
> First American is vigilant and proactive in compliance activities related to the regulations here, both for the Company and on behalf of the entire industry as an active industry representative. Sari Conrad will testify that she has been employed by First American since 2009 as a compliance officer responsible to review and ensure the Company activities related to all trade associations events and promotional events comply with Washington statutes and related regulations before they are undertaken. Ms. Conrad reviewed and approved the Company's activities in connection with the SCCAR event before they were finalized. First American requires approval before implementing co-sponsored activities. Ms. Conrad believed then and now that [First American's] participation and role in co-sponsoring the [Event] fully complied with applicable regulations.

* * *

> When Sari Conrad approved First American's co-sponsorship of the [Event], she was well aware not only of the regulations but of the expectations OIC representatives had communicated to the entire industry.

(Brackets and emphasis added).

WAC 284-02-070(2)(d) emphasizes the informal nature of adjudicative proceedings before the OIC, and states: "Adjudicative proceedings or contested case hearings of the insurance commissioner are informal in nature, and compliance with the formal rules of pleading and evidence is not required." (Emphasis added). Per WAC 284-02-070(2)(d), during adjudicative proceedings before the OIC compliance with the formal rules of pleading, including CR 15(b) (governing claims for relief in complaints), is not required. CR 1 explains that the Washington Superior Court Civil Rules "govern the procedure in the superior court in all suits of a civil nature. . . ." Adjudicative proceedings before the OIC are not in superior court, and therefore arguably the Washington Superior Court Civil Rules have limited applicability, if at all, in such proceedings. Aside from WAC 284-02-070(2)(e)(i)'s incorporation by reference of most of CR 26 through 37 governing discovery, the OIC has not adopted the remaining Superior Court Civil Rules for use in its administrative proceedings, including CR 15(b).

At 3:1-11 of its Petition, First American asserts that the Notice of Hearing is the key pleading of an administrative agency. I would not argue with this statement insofar as it refers to the Notice of Hearing I issued which First American did not object to, and that it embraced wholeheartedly in its Brief as explained above. Even if we were to apply CR 7 to the Application the OIC filed in these proceedings, as the court in *Dewey v. Tacoma School Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999) explains (which First American cites in its Brief), when parties try an issue(s) not raised in the pleadings, they cannot cry foul:

> [3] When issues that are not raised by the pleadings are tried by express or implied consent of the parties, they will be treated in all respect as if they had been raised in the pleadings. *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 766, 733 P.2d 530 (1987). . . . In determining whether the parties impliedly tried an issue, an appellate court will consider the record as a whole, including whether the issue was mentioned before the trial and in opening arguments, the evidence on the issues admitted at the trial, and the legal and factual support for the trial court's conclusions regarding the issues. *Federal Signal Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413, 435-36, 886 P.2d 172 (1994).

In First American's Brief, the testimony of witnesses called by both sides, and the record in this matter, there is a raft of material concerning whether First American's activities regarding the Event complied with the regulations contained in WAC Ch. 284-29, including the provisions First American now argues were improperly addressed in the Final Order. Given this, I conclude that even if we applied the civil rules governing the contents of complaints to the adjudicative proceeding conducted before the OIC, both First American and the OIC tried the issue of whether First American's activities regarding the Event complied with WAC Ch. 284-29, and the

regulations included therein. First American's lack of objection to the Notice of Hearing in this matter, which clearly indicated that the matters First American now objects to were fair game, cements this conclusion.

B. Presiding Officer's Supplementation of the Record in this Matter

RCW 34.05.449(2) states that to "the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the prehearing order." RCW 34.05.458(1) states that a "person who has served as investigator, prosecutor, or advocate in an adjudicative proceeding or in its preadjudicative stage, or one who is subject to the authority, direction, or discretion of such a person, may not serve as a presiding officer in the same proceeding."

RCW 34.05.476(1) requires an agency to maintain an official record of each adjudicative proceeding under RCW Ch. 34.05. RCW 34.05.476(2) states: "The agency record shall include: . . . (d) Evidence received or considered." RCW 34.05.476(3) states: "Except to the extent that this chapter or another statute provides otherwise, the agency record constitutes the exclusive basis for agency action in adjudicative proceedings under this chapter and for judicial review of adjudicative proceedings."

In *Swinomish Indian Tribal Cmty. v. Western Washington Growth Management Hearings Bd.*, 161 Wn.2d 415, 433-434, 166 P.3d 1198 (2007), the Court addressed an inquiry from the county who claimed that the Board erred in using nonrecord materials to define the regulatory concept of "adaptive management," and responded by stating:

> [17] ¶27 The county claims, additionally, that the Board erred in using nonrecord materials to define the concept of "adaptive management." The county argues that the Board is prohibited from consulting nonrecord materials because "'[f]indings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding.'" Skagit County's Opening Br. at 38 (emphasis added) (quoting RCW 34.05.461(4)). <u>In our view, the Board did not err in considering these nonrecord materials because the materials were not evidence</u>. Rather, the Board used the publications to assist in interpreting the term "adaptive management" as used in WAC 365-195-920(2). See 2005 Compliance Order, 2005 GMHB LEXIS 2, at *21-22. Such HN13 use of scholarly materials does not, in our view, transform these materials into "evidence." <u>In sum, the Board's use of the nonrecord materials to aid it in defining the term "adaptive management" did not violate the APA or the GMA</u>.

(Emphasis added).

During the hearing conducted in this matter on March 28-29, 2016, and specifically during the first AM session, while cross-examining a witness called by the OIC, Jim Tompkins, counsel for First American specifically asserted that the OIC October 2006 Study entitled "An Investigation into the Use of Incentives and Inducements by Title Insurance Companies" ("Report"), ultimately

entered into the record as Exhibit PO-2 in this matter On April 11, 2016, spawned class action against First American and other title companies. At one point during his cross-examination, counsel for First American asserted that none of the opinions in the Report have ever been confirmed by a court of law. Counsel for First American then stated that the class action litigation resulted in the trial court "throwing out claims" on which the Report was based. However, as I explain at footnote 9 of the Final Order, the litigation counsel for First American referred to was not thrown out based on the merits of the claims in the Report, but rather because the plaintiffs lacked standing. Quoting from the United States District Court for the Western District of Washington's decision in *Blaylock v. First American Title Insurance Co.*, Case No. C06-1667RAJ at footnote 9 of the Final Order, I explained that in dismissing the claim the Court actually emphasized the importance of the Report's findings and stood by them, stating in part at *43: "In this case, either the Insurance Commissioner or private claimants who suffered more direct injuries must champion the effort to rectify the harm from Defendants' unlawful inducements." (Emphasis added). The Report was also mentioned in the Final Bill Report for SSB 6847, discussed at page 9 of the Final Order.

The Report was obviously an important document given that it was drafted by the OIC, relied upon by the Legislature, and referenced by counsel for First American. In an effort to supplement the record and to facilitate referring to it in my Final Order, I obtained a copy of the Report, and on April 11, 2016, entered it into the record as Exhibit PO-1. At no time prior to the issuance of the Final Order did counsel for First American object to my entering Exhibit PO-1 into the record, even though it had ample time to do so if it felt that was necessary. Per the holding in *Swinomish Indian Tribal Cmty.*, I was firmly within my right to enter a copy of the full report into the record and refer to it in the Final Order.

Contrary to First American's statement at 6:14-16 and 7:21-8:2 of its Petition that it is "aware of no authority which allows a presiding officer to independently investigate additional facts after the hearing and to retroactively add them to the record in the proceedings," or its assertion at 6:22-23 of its Petition that "hearing officers do not have the power to determine what is included in the evidentiary record of proceedings," WAC 10-08-200 explains that a presiding officer that conducts adjudicative proceedings shall have the authority, to among other things:

> (8) Interrogate witnesses called by the parties in an impartial manner to develop any facts deemed necessary to fairly and adequately decide the matter;
>
> (9) Call additional witnesses and request additional exhibits deemed necessary to complete the record and receive such evidence subject to full opportunity for cross-examination and rebuttal by all parties;
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> * * *
>
> (16) Take any other action necessary and authorized by any applicable statute or rule; and
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> (17) Waive any requirement of these rules unless a party shows that it would be prejudiced by such a waiver.

(Emphasis added).

Under WAC 10-08-200, the Report could not be cross-examined, and counsel for First American attempted to rebut the findings in the Report during cross-examination of Mr. Tompkins by simply erroneously stating that the trial court in *Blaylock* had discredited its findings, when in fact that was not the case, as explained above.

Also, during direct and cross-examination, and via questions from the Presiding Officer, numerous witnesses testified as to whether work by First American employees on the Event was time that First American donated on behalf of a trade association committee under WAC 284-29-220(1). Ryan McIrvin ("McIrvin") of SCCAR actually testified in the negative to this question. WAC 284-29-220(1) states: "A title company may donate the time of its employees to serve on a trade association committee." Aside from the testimony of SCCAR employee McIrvin who testified that the work of First American employees on the Event was not as part of an *ad hoc* committee of SCCAR, subsequent testimony from First American employees involved with the Event, argued that in interpreting the phrase "trade association committee" in WAC 284-29-220(1), they would apply a plain meaning approach.

In *Gorre v. City of Tacoma*, 184 Wn.2d 30, 37, 357 P.3d 625 (2015), however, the Court explained that the ordinary definition of a term is not dispositive of a statute's plain meaning where the term is also a term of art. A "trade association committee," like the term "respiratory disease" examined in *Gorre*, is a term of art that has meaning for the members of SCCAR, including First American. Article XIII of SCCAR's Bylaws describe the process of forming a SCCAR committee.

Given the vast amount of testimony on the committee issue, I felt it was necessary to obtain the Bylaws of SCCAR, to examine whether they in fact addressed the committee issue, which as it turns out they do. Therefore, on March 30, 2016, immediately following the hearing, my paralegal requested a copy of the Bylaws of SCAAR from SCCAR, and copied both counsel for First American and the OIC on that request. After receiving the Bylaws from SCCAR, and in an effort to refer to them in the Final Order, I entered the Bylaws of SCCAR as Exhibit PO-2. At no time prior to the issuance of the Final Order did counsel for First American object to my entering Exhibit PO-2 into the record, even though it had ample time to do so if it felt that was necessary. Per the holding in *Swinomish Indian Tribal Cmty.* and WAC 10-08-200, I was firmly within my right to enter a copy of the SCCAR Bylaws into the record and refer to it in the Final Order.

In tandem with the mischaracterization by counsel for First American of the trial court's handling of the Report in *Blaylock* during the cross-examination of Mr. Tompkins at the onset of the hearing in this matter, troubling is the statement made by First American at 8:8-9 of its Petition in support of its position that I did something wrong by supplementing the record in this matter with documents addressed either directly or indirectly during the hearing, that reads as follows: "Relevant evidence is often omitted from proceedings as a result of tactical or other decisions by parties or their counsel." RPC 3.3 states:

> (a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by the opposing party; or

(4) offer evidence that the lawyer knows to be false.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding.

(c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by Rule 1.6.

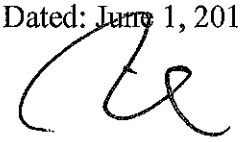
Comment 1 to RPC 3.3 states that this Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal, and specifically cross-references RPC 1.0A(m) for the definition of "tribunal." RPC 1.0A(m) defines "tribunal" as: "a court, an arbitrator in a binding arbitration proceeding or legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter."

While it is quite possible that counsel for First American consciously chose not to share both the Bylaws of SCCAR and the Report with me as Presiding Officer because of tactical concerns for his client, as the Brief suggests, such concerns do not trump his obligations to the tribunal (the OIC Presiding Officer) in this matter under RPC 3.3. At no time did I question witnesses without giving the parties an opportunity to observe and participate, or conduct an *investigation* into the allegations in this case. I simply exercised my authority to supplement the record with materials discussed at the hearing in this matter that would assist me in drafting a Final Order in this matter. The passing reference at footnotes 3-4 of the Final Order to material on SCCAR's website is yet another instance of me supplementing the record with material pertinent to a subject discussed at the hearing (i.e., First American's position that a SCCAR committee existed as to the Event). For the foregoing reasons, First American's Petition is denied.

4. ***Ruling.***

The Petitions of both the OIC and First American are denied for the reasons articulated above.

Dated: June 1, 2016



WILLIAM PARDEE
Presiding Officer

This order represents the final action of the OIC. 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.

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 the Petitions for Reconsideration filed by the OIC and First American on the following people at their addresses listed below:

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James T. Odiorne, J.D., CPA, Chief Deputy Insurance Commissioner
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AnnaLisa Gellermann, Deputy Commissioner, Legal Affairs Division
Marcia G. Stickler, Insurance Enforcement Specialist, Legal Affairs Division
Office of the Insurance Commissioner
PO Box 40255
Olympia, WA 98504-0255

Dated this 1st day of June, 2016, in Tumwater, Washington.

Dorothy Seabourne-Taylor
Paralegal
Hearings Unit