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2015 NOV 13 P 4:12

HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER

**STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER**

In the Matter of

Docket No. 15-0205

**KAISER FOUNDATION HEALTH
PLAN OF THE NORTHWEST,**

**OIC'S RESPONSE TO
KAISER'S MOTION FOR
SUMMARY JUDGMENT**

Respondent.

Kaiser presents three issues in its Motion for Summary Judgment: that the OIC's interpretation of service area should not apply to large group plans, that the Cease and Desist Order should not be effective immediately, and that the Hearing Officer should find good cause to allow Kaiser to limit its service area to zip code. Each of these arguments are untimely. The only issue properly before this tribunal is whether or not the Cease and Desist Order should be stayed, which has already been briefed by the parties and an Order was issued deciding this matter.

I. INTRODUCTION

In order to protect the members of the public who purchase insurance, individuals who would make a claim that is covered by insurance and the insurance industry, the Office of the Insurance Commissioner was established to regulate those who would seek to offer insurance and to protect those who purchase it. The licensing, filing, and approval requirements in the Insurance Code are designed to protect the public interest in this uniquely important industry.

That protection is never more important than when a person needs to access medical care. For this reason, the Legislature promulgated specific statutes stating, "It is the intent of the legislature that enrollees covered by health plans receive quality health care designed to maintain and improve their health. The purpose of [RCW 48.43.500] is

1 to ensure that health plan enrollees: (1) Have improved access to information regarding
2 their health plans; (2) Have sufficient and timely access to appropriate health care
3 services, and choice among health care providers....” RCW 48.43.500. The Legislature
4 then instructed the Commissioner to adopt rules creating standards to ensure that
5 enrollees of health plans have access to care. RCW 48.43.515. Washington’s network
6 access laws and regulations exist to protect the people of Washington State by ensuring
7 that all health plan networks have enough types and numbers of doctors within a
8 reasonable distance, so that people can access the care they need. RCW 48.43.500,
9 RCW 48.43.515, and WACs 284-43-200 through 284-43-261.

10 Every issuer’s service area (the area where an issuer has approval to offer
11 coverage) is reviewed to ensure that its enrollees have sufficient access to medical
12 services within the service area. *See* WAC 284-43-200-WAC 284-43-230. Every issuer
13 submits network reports as prescribed by WAC 284-43-220 for approval of its network
14 from the OIC. These network reports consist of the Provider Network Form A, the
15 Provider Directory Certification, Network Enrollment Form B, Geographic Report and
16 the Access Plan, all of these reports combined are typically called Access Plans. *Id.*
17 Every issuer must establish an Access Plan specific to each product that describes the
18 issuer’s strategy, policies, and procedures necessary to establishing, maintaining and
19 administering an adequate network in its service area. *Id.* When an issuer files a
20 Network Access Plan as required by WAC 284-43-220, the network’s service area is
21 reviewed by the OIC pursuant to WAC 284-43-230 for network adequacy based upon
22 the information provided in the Access Plan for the issuer’s service area. Provided there
23 are no problems in the Access Plan, the issuer then files its rates and forms for its health
24 plans and then can sell health plans supported by the network as reported and filed in its
25 Access Plan and as approved by the OIC. WAC 284-43-230.

26 Every issuer’s service area must be defined by county or counties so that each
issuer’s network can be properly evaluated to ensure reasonable access to care for
enrollees, and to ensure that all issuers receive the same evaluation. *See* WAC 284-43-
130(29), WAC 284-43-110 through WAC 284-43-230. For example, an issuer must
demonstrate that for each health plan’s defined service area, a comprehensive range of

1 primary, specialty, institutional and ancillary services are readily available without
2 unreasonable delay to all enrollees and that emergency services are accessible twenty-
3 four hours per day, seven days per week without unreasonable delay. WAC 284-43-
4 200(1). Every issuer's service area must also be defined by county to ensure that all
5 residents of a county can received access to health insurance and health care, not simply
6 residents or employers in the most populated areas, which would exclude rural residents
7 or rural employers from access to needed medical services. "This section puts the
8 responsibility on the issuers to demonstrate that services are readily available without
9 unreasonable delay to all enrollees and each enrollee must have adequate choice among
10 providers." Concise Explanatory Statement ("CES") page 22.

11 Issuers are not allowed to sell plans outside of the service area reported in its
12 approved Access Plan because the issuer has not filed an Access Plan for that area and
13 therefore has not demonstrated that its enrollees will have sufficient access to medical
14 services. Kaiser not only violates the network access regulations, but also violates RCW
15 48.44.040 for continuing to accept premiums and selling policies that do not conform
16 with its rate and form filings. Not only does a carrier violate the Insurance Code when it
17 sells a plan out of its approved service area, but it prevents the Insurance Commissioner
18 from fulfilling his duties to protect consumers as mandated by the Legislature because
19 the Commissioner has not evaluated those plans for network accessibility.

20 Kaiser marketed and sold large group health plans which stated that Kaiser's
21 service area was certain geographic locations by zip code in the Northwest. Kaiser's
22 health plan contracts did not inform employers purchasing these health plans that its
23 health plans were only approved to be offered to employees who lived or worked in
24 Kaiser's service area of Clark and Cowlitz Counties. Therefore, Kaiser enabled its
25 health plans to be offered to enrollees who were not in its approved service area
26 violating the network access laws and regulations and violating Kaiser's own filed and
approved Access Plan.

1 **IV. ARGUMENT AND AUTHORITY**

2 **A. Motion for Summary Judgment**

3 For purposes of a motion to dismiss or motion for summary judgment, the facts in
4 the demand for hearing are generally presumed to be true. Kaiser contests no facts in
5 OIC's Order to Cease and Desist or subsequent motions. However, Kaiser failed to state a
6 justiciable argument in its Motion for Summary Judgment. There is no subject matter
7 jurisdiction over Kaiser's arguments because the statutory time limits to demand a hearing
8 on OIC's determination have long since passed. The Cease and Desist Order is merely
9 enforcement of the Commissioner's prior order that suspended Kaiser's health plan
10 contracts, which Kaiser agreed to comply with, but then proceeded in not complying with
11 the Commissioner's determination. Furthermore, regardless of Kaiser's argument about the
12 interpretation or definition of service area, Kaiser is not in compliance with its own Access
13 Plan that was submitted and approved by the OIC, which limits Kaiser's ability to sell plans
14 and offer plans to employers and their employees who live or work in Clark and Cowlitz
15 counties. Therefore, the only justiciable claim that can be heard is whether Kaiser's
16 Motion to Stay should be granted or denied.

17 **B. Kaiser violated its Access Plan and the Plain Meaning of the Network Access**
18 **Regulations.**

19 The Legislature mandated that the Commissioner draft network access laws to
20 ensure that all enrollees of health care plans have sufficient and timely access to
21 appropriate health care services and choice among health care providers. The
22 Legislature did not state that only individual or small group members should have
23 sufficient and timely access to appropriate health care services and choice among
24 health care providers. However, Kaiser argues that large group plans should be
25 exempted from these protections simply because they are large group plans. In
26 support of its argument, Kaiser cites that some of the guidelines considered in
developing Washington's network adequacy laws were the federal guidelines for small
group and individual health plans, and therefore the OIC's network adequacy laws

1 should not apply to all health plans. However, Washington's network access laws
2 have always applied to all health plans.

3 When updating the network access laws in 2013-2014, the OIC considered a
4 large number of laws that were being written and research that was conducted on
5 network access, including the federal standards for network access as implemented by
6 the ACA. At least forty-five sources were used for guidance to develop standards and
7 the OIC received numerous responses and suggestions during the stakeholder and rule
8 development process. Exhibit 1, CES, page 3-8, 57. While writing these updated
9 regulations, the Commissioner specifically declined to implement the federal standards
10 because they applied only to qualified health plans, like those offered on the exchange.
11 CES Page 9.¹ Furthermore, the network access regulation's Implementation Plan
12 specifically details what dates large group plans were to submit information for
13 compliance with these rules. OIC Exhibit 1, Implementation Plan within CES as
14 "Exhibit A," pgs 89 -90. Washington's network access laws have always applied to
15 all health plans, and the updates made to these regulations continued with this same
16 standard; that these regulations would apply to all health issuers and health plans
17 including large group health plans.

18 Kaiser also argues that it did not believe that these laws and regulations applied
19 to large group plans.² However, this argument falls flat given Kaiser's numerous
20 actions that demonstrate that it fully understood that these laws and regulations applied
21 to all health plans, including the definition of service area. Kaiser even understood

22 ¹ "The Commissioner also declines to adopt the federal network adequacy
23 standards as it only pertains to qualified health plans and is only evaluating networks on
24 a "reasonable access" standard...These standards ignores many types of providers and
25 facilities whose inclusion in networks needs to be evaluated and fails to account for the
26 unique nature of Washington State insurance markets, both inside of and outside of the
Exchange."

² In support of Kaiser's misunderstanding, Kaiser cites to Kaiser's own internal
email that implies that they were advised by Beth Berendt, who was not a member of the
rulemaking team and left the OIC in 2013. However, this email was not sent to the OIC
nor written by the OIC – it was simply an entirely internal Kaiser email. Furthermore,
this email is dated in May of 2013, before the Preproposal Statement of Inquiry, CR-
101, was even filed for rulemaking. The CR-101 was filed on September 18, 2013.

1 this from the very beginning when it issued comments to the rulemaking of the current
2 network access regulations. Even back then Kaiser stated: “We disagree with the
3 premise that network adequacy rulemaking is necessary for integrated health care
4 delivery systems with high levels of customer satisfaction and quality
5 acknowledgment from key outside rating organizations... We request that the rules
6 presume network adequacy for integrated health systems, such as Kaiser
7 Permanente...” OIC Exhibit 6. In that same letter submitted, Kaiser clarified and
8 acknowledged its approved service area and stated “We have 75,000 members
9 enrolled in Washington health plans in our service area of Clark and Cowlitz
10 Counties.” *Id.*

11 Kaiser even requested that the OIC change the draft language of the definition
12 of “service area” in the proposed WAC 284-43-130(29) to remove the language
13 “within this state” to allow Kaiser to include providers located on the border of
14 Oregon in its service area. OIC Exhibit 7. This request was granted, and the rule was
15 modified to allow issuers, like Kaiser, to include providers on the borders. OIC
16 Exhibit 1, CES, pg 15.

17 Furthermore, Kaiser’s own actions demonstrate that it was fully aware that the
18 network access laws applied to all health plans. Kaiser submitted an Access Plan to
19 support its plans in compliance with the network access laws. Kaiser also submitted
20 an AADR which was approved by the OIC to enable Kaiser to offer its health plans in
21 Clark County despite not having a contract with a hospital in that county.

22 Regardless, Kaiser’s knowledge of the applicability of the network access laws
23 is not relevant to the violations. There is no component of these laws that requires that
24 the violations to be intentional. Furthermore, issuers, like any other party violating a
25 law, are presumed to know the law, which includes the network access laws and
26 regulations in WAC Chapter 284-43. The definition of “service area” is provided in
WAC 284-43-130(29), under the definitions that are to be applied throughout the
Chapter. WAC 284-43-130(29) provides that “[s]ervice area” means the geographic
area or areas where a specific product is issued, accepts members or enrollees and

1 covers provided services. This definition is applicable to the entire WAC 284-43
2 Chapter including the network access regulations.

3 WAC 284-43-110 outlines the purpose of the chapter, including the network
4 access regulations within the chapter. "The purpose of this chapter is to establish
5 uniform regulatory standards for health carriers and to create minimum standards for
6 health plans that ensure consumer access to the health care services promised in these
7 health plans" WAC 284-43-110. "This chapter shall apply to all health plans and all
8 health carriers subject to the jurisdiction of the state of Washington except as
9 otherwise expressly provided in this chapter..." WAC 284-43-120. There is no
10 exception provided for large group plans from these network access regulations. "For
11 health insurance coverage to be effective, both qualified health plans and health plans
12 offered outside of the Exchange must have networks that, at a minimum, ensure access
13 to covered services without unreasonable delay and address the specific needs of the
14 population served. Exhibit 2, Financial Cost Benefit Analysis, pg 1 and Exhibits 3, 4,
15 and 5, CR 101, 102 and 103P.

16 The plain language of the regulations mandate that all health carriers must
17 comply with the network access regulations, including the application of service area.
18 When words in a statute or regulation are plain and unambiguous, statutory
19 construction is not necessary and the tribunal must apply the statute or regulation as
20 written, unless the statute evidences an intent to the contrary. *See Enter. Lasing, Inc.*
21 *v. City of Tacoma, Fin. Dept.* 137 Wn.2d 546, 552, 988 P.2d 961 (1999). Even if the
22 language of the rule were not plain, the agency's interpretation of insurance statutes
23 and rules is entitled to deference. *See Credit Gen. Ins. Co. v. Zewdu*, 82 Wn. App.
24 620, 627, 919 P.2d 93 (1996); see also *Retail Store Employees Union, Local 1001 v.*
25 *Wash. Surveying & Rating Bureau*, 87 Wn.2d 887, 898, 558 P.2d 215 (1976) ("We
26 may place greater reliance than usual upon an administrative statutory interpretation in
this case because the [Insurance] Commissioner has been entrusted with very broad
discretion and responsibility ..."). Substantial weight is accorded the agency's view of
the law. *Premera v. Kreidler*, 133 Wn. App. 23, 31, 131 P.3d 930 (2006) (quoting
Franklin County Sheriff's Office v. Sellers, 97 Wn.2d 317, 325, 646 P.2d 113 (1982)).

1 Under the plain language of the network access regulations, all health plans and all
2 issuers must comply with the network access rules, there are no exclusions for large
3 group plans. Kaiser presents nothing more than red herrings in an attempt to muddy
4 the plain and clear language of the regulations.

5 Furthermore, Kaiser cannot now reassert defenses and arguments simply because
6 the OIC is enforcing its prior determination after learning of Kaiser's continuing
7 violations. Kaiser should have requested a hearing under RCW 48.04.010(3) if Kaiser
8 wanted to exercise its right to appeal the OIC's determination. A disposition within
9 SERFF, such as suspension or approval, is a final order and must be appealed with
10 ninety (90) days. *See* OIC Order #14-0187.³ Kaiser's Demand for Hearing was due
11 June 30, 2015 ninety (90) days after Kaiser received notice of the OIC's suspension of
12 its health plan contracts pursuant to RCW 48.04.010(3). Compliance with a statutory
13 filing deadline is a jurisdictional requirement. *Snohomish County Fire Prot. Dist. No.*
14 *1 v. Wash. State Boundary Review Bd. For Snohomish County*, 121 Wn. App. 73, 82,
15 87 P.3d 1187 (2004) *aff'd*, 155 Wn.2d 70, 117 P.3d 348 (2005). A mandatory filing
16 period acts as a jurisdictional bar. *Graham Thrift Group, Inc. v. Pierce County*, 75
17 Wn. App. 263, 267-268, 887 P.2d 228 (1994). Kaiser acknowledges that it began this
18 process and appealed this determination within the OIC, but then withdrew this
19 request, agreed with the OIC and corrected the definition of service area in its health
20 plans to match its Access Plan and the definition of service area as provided in WAC
21 284-43-130(29). Kaiser already raised these defenses in that appeal, which it then
22 conceded and withdrew. Kaiser is now outside the statute of limitations to raise these
23 issues and the only matter that can be heard by this tribunal is whether the Motion to
24 Stay should be granted or denied, which has already been determined by these parties.

25 ³ [http://www.insurance.wa.gov/laws-rules/administrative-hearings/judicial-
26 proceedings/documents/14-0187-order-summary-judgment.pdf](http://www.insurance.wa.gov/laws-rules/administrative-hearings/judicial-proceedings/documents/14-0187-order-summary-judgment.pdf)

1 C. Kaiser's Request That The Cease and Desist Order Should Not Be Effective
2 Immediately Has Already Been Briefed, Argued and Has Been Determined By
3 This Tribunal.

4 Kaiser has previously filed a Motion to Stay in this matter in which it argued
5 that the Cease and Desist Order should not be effective immediately. This argument
6 was fully briefed by both sides and has been determined by the Presiding Officer.
7 Kaiser appears to be briefing this argument further in hopes to convince the Presiding
8 Officer to allow Kaiser to continue offering its unlawful plans in violation of the
9 network access laws and in violation of its own filed Access Plan. Because this matter
10 has already been briefed and argued by the parties, it is inappropriate and untimely for
11 Kaiser to once again assert this argument. The Presiding Officer has already
12 determined that Kaiser did not meet its burden to stay the OIC's Cease and Desist
13 Order.

14 D. This Tribunal Cannot Evaluate Kaiser's Request to Limit Its Service Area to
15 Zip Code Because This Request Was Not Properly Submitted to the
16 Commissioner and Because Kaiser Did not Submit This Request Prior to Sale
17 of Its Health Plans. Good Cause is Not Found Simply Because an Issuer is in
18 Violation of the Insurance Code.

19 In its Motion for Summary Judgment, Kaiser requests for the first time for the
20 OIC to consider limiting its service area to zip codes. This is an improper request for
21 this tribunal for many reasons, primarily due to the timing and nature of Kaiser's
22 request. Good cause includes geographic barriers within a service area, or other
23 conditions that make offering coverage throughout an entire county unreasonable.
24 WAC 284-43-130(29). The guidance is clear, the only reasons that a deviation based
25 upon zip code should be approved is due to specific issues such as land or water
26 barriers within the state. Good cause is to be used in only extraordinary circumstances
as delineated in the regulation; it is not meant to be a tool to avoid the general
standards of these regulations. Good cause is not established because an issuer is in
violation of the network access laws or because it refuses, as a matter of practice, to

1 contract with other providers to complete its network if the issuer desired to offer
2 plans in other counties.

3 A request for approval to limit a service area by zip code is submitted and
4 demonstrated by the issuer to the Commissioner prior to any plans being sold for
5 approval by the OIC. Unlike an Alternative Access Delivery Request (AADR), which
6 typically is filed when an issuer with an approved network cannot maintain network
7 adequacy due to later contracting issues, although an AADR is sometimes submitted at
8 the creation of a network for OIC approval when good faith contracting efforts are
9 made, but the issuer cannot meet the network access standards. See OIC Exhibit 1,
10 CES. Both the AADR and a request to limit a service area to zip codes require the
11 Commissioner's approval of the network or approval of the modification prior to sale
12 of the plans.

13 The Commissioner's remedy when a violation is found is disapproval of the
14 provider agreement, network or an alternate access delivery request. OIC Exhibit 1,
15 CES Page 16. An AADR details how a carrier will meet the network access standards
16 through an alternative proposal, which is then approved or denied by the OIC. *See Id*
17 and WAC 284-43-220. Approval of service area limitation by zip code cannot be
18 sought by an issuer, like Kaiser, who is presently violating the Insurance Code and
19 now seeking a means to continue in its unlawful behavior. *Id.*

20 Furthermore, the request to limit Kaiser's service area by zip code is also
21 improper because this request was not submitted for OIC's evaluation, rather it is
22 raised now for the first time. Kaiser is fully aware that it could have submitted this
23 request through the appropriate means as required by the regulations, but Kaiser did
24 not. *See Previously Submitted Decl. of Jennifer Kreidler.* Instead, Kaiser now submits
25 this request in hopes to further delay the enforcement of a determination that was
26 already made by the OIC. Kaiser did not submit this request when its health plans
were suspended by the OIC, or even after being advised that the OIC might consider
the request if Kaiser submitted good cause. *Id.* The timeframe to have submitted this
request has passed. Kaiser did not timely request a hearing or submit this request. The
OIC's determination that Kaiser is in violation of the network access regulations and

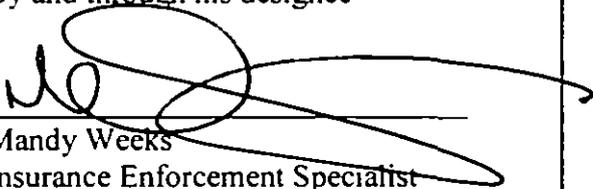
1 its filed Access Plan by continuing to allow its health plans to be offered to individuals
2 who do not qualify is a final order. The Cease and Desist Order is merely an
3 enforcement tool of the Commissioner's prior determination.

4
5 **V. CONCLUSION**

6 For these reasons, the OIC requests that Kaiser's Motion for Summary Judgment
7 be denied and that the Presiding Officer enter an order limiting the issues in this matter
8 to whether the Cease and Desist Order should be stayed or effective immediately as
9 provide for in the Cease and Desist Order.

10 DATED this 13th day of November, 2015.

11
12 MIKE KREIDLER
13 Insurance Commissioner
14 By and through his designee

15 
16 Mandy Weeks
17 Insurance Enforcement Specialist
18 Legal Affairs Division
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