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HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER

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

7 In the Matter of

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

10 Respondent.

Docket No. 15-0205

OIC # 702

NAIC# 95540

OIC'S RESPONSE AND
OPPOSITION TO KFHPNW'S
MOTION FOR STAY OF
CEASE AND DESIST ORDER

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13 **I. INTRODUCTION**

14
15 Insurance plays a unique and important role in our society. For this
16 reason, the legislature has determined that, "The business of insurance is one affected by
17 the public interest, requiring that all persons be actuated by good faith, abstain from
18 deception, and practice honesty and equity in all insurance matters." RCW 48.01.030.
19 In order to protect not only the members of the public who purchase insurance, but also
20 those individuals who would make a claim that is covered by insurance, the Office of the
21 Insurance Commissioner ("OIC") was established to regulate those who would seek to
22 offer this uniquely important product, and to protect those who purchase it. The
23 licensing, filing, and approval requirements in the Insurance Code are designed to
24 protect the public interest in this uniquely important industry.

25 That protection is never more important than when a person needs access to
26 medical care. Washington's network access laws and regulations exist to protect the
people of Washington State. They ensure that networks have enough types and numbers

1 of doctors within a reasonable distance, so that people can access the care they need.
2 Each carrier's service area is reviewed to ensure that its enrollees have sufficient access
3 to medical services within the service area. Carriers are not allowed to sell plans outside
4 of their filed service area because the carrier has not demonstrated that enrollees have
5 sufficient access to medical services delivered by participating providers as guaranteed
6 in the contract.

7 As required, Kaiser filed access plans that defined their service area and health
8 plans with the OIC. The health plans were later modified to comply with the definition
9 of service area in WAC 284-43-130(29) and to conform to Kaiser's service area as
10 provided in its access plan which defined its service area as Clark and Cowlitz counties.
11 The health plan correction applied to the start of the plan period. Kaiser's access plans
12 and health plans identify its sole service area as two counties: Clark and Cowlitz. Kaiser
13 demonstrated an adequate network for only those counties and as a result, Kaiser is only
14 authorized to sell plans to enrollees that qualify by living or working in Clark or Cowlitz
15 counties.

16 On April 1, 2015, the OIC discovered that the Kaiser was selling health plans out
17 of its service area. The OIC immediately engaged Kaiser in discussion about the
18 prohibited sale of plans, and received assurance that only two plans were sold to enrollees
19 out of its services area, that Kaiser was aware of the issue and would take immediate steps
20 to correct it, and that Kaiser did not intend to expand its service area, but intended to sell
21 plans in Clark and Cowlitz counties only.

22 The OIC later discovered that Kaiser had offered health plans to at least 46
23 enrollees who both lived and worked outside of its service area. The OIC further learned
24 that Kaiser had renewed the Bonneville Hotsprings Resort health plan, which is an
25 employer based outside of Kaiser's service area and includes enrollees that neither live
26 nor work within Kaiser's service area.

In response to this blatant disregard for the law, and based on concern for
consumers with inadequate access to medical services, the OIC issued an Order to Cease
and Desist that is at issue here.

1 Kaiser seeks a stay of the Order to Cease and Desist arguing that discontinuing its
2 unlawful sale of these plans would be harmful to enrollees and its business. It is true that
3 people will likely be concerned by the termination of the plans that Kaiser unlawfully sold
4 them. The OIC will work with Kaiser to ensure a smooth transition for those people to
5 lawful plans currently available to them through other issuers. However, any harm to
6 Kaiser and its business interests was self-inflicted. Kaiser knowingly chose to offer plans
7 that violated its filed access plan and health plans, and the Insurance Code. Kaiser has
8 failed to demonstrate any valid reason why the Cease and Desist Order should be stayed,
9 therefore its motion should be denied.

10 **II. ISSUE**

11 Can Kaiser's request for a stay of the Order to Cease and Desist be granted, when
12 Kaiser is unlikely to prevail on the merits of its appeal, when any injury to Kaiser is
13 minimal and self-inflicted, and when the granting of a stay will result in continued harm
14 to people who purchased plans with inadequate networks?

15 **III. EVIDENCE REPLIED UPON**

16
17 This Response and Opposition relies upon the declarations of Jennifer Kreitler
18 and Linda Broyles, the exhibits attached to the declarations, and the Chief Hearing
19 Officer's files and records herein.

20 **III. STATEMENT OF FACTS**

21
22 In 2014, Kaiser filed access plans and rates and forms for its health plans new
23 and renewing on or after January 1, 2015. Large group health plans filed by Health Care
24 Service Contractors, like Kaiser, are often referred to as "file and use" plans. These
25 plans did not require prior approval before sale or issuance by the OIC, but are
26 submitted for immediate use. *See* WAC 284-43-920. As a result, if upon later review,

1 the OIC determines that a plan is not compliant with the Insurance Code, the OIC will
2 provide the carrier with an objection to the plan and require corrections to be made to
3 the health plan contract documents submitted in the filings to comply with current laws
4 and regulations. On April 1, 2015, the OIC provided Kaiser objection and notice that its
5 plans improperly defined its service area. *See* Declaration of Linda Broyles. The
6 objection stated,

7 “The definition of “Service Area” provided indicates the service
8 area consists of certain geographic areas in the Northwest as designated
9 by ZIP code. The definition continues on to advise the service area may
10 change. Under WAC 284-43-130(29) a service area must be defined by
11 county or counties and may not be defined by ZIP code unless allowed by
12 the Commissioner for good cause, such as geographic barriers which
13 make coverage throughout an entire county unreasonable. You must
14 redefine your service area by county and remove the language indicating
15 the service area may be changed.” *Id.*

16 On April 7, 2015, Kaiser submitted its initial response that it believed that WAC
17 284-43-130(29) only applied to individual and small group plans and that it did not
18 apply to large group plans. *Id.* On April 28, 2015, Kaiser requested to discuss the
19 objections and definitions with the OIC and discussions began telephonically and via
20 email. *See* Declaration of Jennifer Kreitler. On May 11, 2015, the OIC provided
21 detailed information to Kaiser about the definition of service area and its application to
22 large group plans. *Id.* At this time, Kaiser was also advised that it could request to
23 expand its service area to add counties in addition to Clark and Cowlitz counties or that
24 it could request a service area limitation by demonstrating good cause. *Id.* On May 27,
25 2015, Kaiser advised the OIC that it would be correcting the definition of service area in
26 its health plans to match its access plan’s filed service area of Clark and Cowlitz
counties, and thus would comply with WAC 284-43-130(29). *Id.* The OIC requested
Kaiser to confirm that only two group plans were sold to participants who did not live or
work in Cowlitz and Clark counties. *Id.* That same day, Kaiser assured the OIC that
only two group were sold to enrollees who did not live or work inside of Clark or
Cowlitz county. On May 27, 2015, when Kaiser agreed to correct its form filings to
conform with WAC 284-43-130(29), it stated “...our forms will need to be updated but

1 we will no longer issue a policy to a policyholder located outside of Cowlitz or Clark
2 county.”

3 However, Kaiser renewed the Bonneville Hotsprings Resort large group health
4 plan on June 1, 2015. *Id.* To the OIC’s knowledge, this is Kaiser’s only large group
5 plan that does not have a plan year renewal date on December 31, 2015 – when the
6 Order to Cease and Desist requires all plans offered to enrollees who do not live or work
7 in Kaiser’s service area to end. Only the members of the Bonneville Hotsprings Resort
8 large group health plan who did not qualify by living or working inside of Clark or
9 Cowlitz county, which totals twenty-three people (23)¹, will receive a mid-year
10 termination.

11 On June 16, 2015, Kaiser began replacing the 2015 contract documents in all of
12 its rate and form filings to the correct definition of service area and completed this for all
13 plans by July 1, 2015. Kaiser then reissued Certificates of Coverage² to enrollees with
14 the correct definition of service area reflecting that its plans serve people who live or
15 work in Clark or Cowlitz counties. *See* Declaration of Linda Broyles. With new
16 contract documents replacing the original contract documents, the plans were then
17 automatically corrected to the appropriate limitations on service area from the beginning
18 of the policy. Therefore any sale previously conducted or being conducted must conform
19 to the terms of the policy, including the limitation of service area to Clark and Cowlitz
20 County. In accepting premium payments from groups who have enrollees who do not
21 live or work in Clark or Cowlitz counties, Kaiser not only violates the network access
22 regulations, but also violates RCW 48.44.040 for continuing to accept premiums and
23 selling policies that do not conform with its rate and form filings.

24 Additionally, on August 3, 2015, the OIC learned from Kaiser that the WA
25 Public Employee Benefit plan was also sold to people who did not live or work within
26 Kaiser’s service area of Clark and Cowlitz counties. As a result, the OIC became
concerned that it was likely that more unidentified plans were sold to people who did not

¹ Kaiser identified that only twenty-three (23) people on this plan (out of thirty-five (35) total health plan enrollees) do not live or work in Clark or Cowlitz counties.

² Kaiser referred to these as Evidence of Coverage in its communications.

1 live or work in Clark or Cowlitz counties. *Id.* To ensure that Kaiser did not sell any
2 further policies outside of its service area, the OIC filed the Order to Cease and Desist
3 on September 29, 2015.

4 IV. AUTHORITY AND ARGUMENT

5 Kaiser's request for a stay of the Cease and Desist Order in this matter should
6 be denied. The Insurance Commissioner's use of a Cease and Desist Order with an
7 immediate effective date is proper and legal. The Insurance Code provides that "[i]f the
8 commissioner has cause to believe that any person is violating or is about to violate any
9 provision of this code or any regulation or order of the commissioner, he or she may (a)
10 issue a cease and desist order. RCW 48.02.080(3). Good cause for issuing the Cease
11 and Desist Order is laid out at length in the body of the Order itself:

12 The Office of the Insurance Commissioner previously informed Kaiser
13 that it met network access standards only in Clark and Cowlitz counties, and
14 selling plans outside of this service area would be in violation of the network
15 access regulations.³

16 Kaiser chose not to pursue sufficient network access in counties outside
17 of Clark and Cowlitz, through either contracting with more providers or by filing
18 an alternative access delivery request (AADR).

19 Kaiser acknowledged to the Office of the Insurance Commissioner the
20 inadequate networks in all other Washington counties and chose to limit its

21 ³ WAC 284-43-130(29) provides that "[s]ervice area" means the geographic
22 area or areas where a specific product is issued, accepts members or enrollees and covers
23 provided services. A service area must be defined by the county or counties included
24 unless for good cause, the commissioner permits limitation of a service area by zip code.
25 Good cause includes geographic barriers within a service area, or other conditions that
26 make offering coverage throughout an entire county unreasonable." WAC 284-43-
130(29) is part of the general provisions and definitions of the entire WAC Chapter 284-
43, therefore applicable to all subchapters therein, including the network access rules in
Subchapter B. WAC 284-43-110 outlines the purpose of the chapter, including the
network access regulations within the chapter. "The purpose of this chapter is to
establish uniform regulatory standards for health carriers and to create minimum
standards for health plans that ensure consumer access to the health care services
promised in these health plans" WAC 284-43-110. "This chapter shall apply to all
health plans and all health carriers subject to the jurisdiction of the state of Washington
except as otherwise expressly provided in this chapter..." WAC 284-43-120.

1 service area to Clark and Cowlitz counties. Subsequently, Kaiser filed network
2 access reports for Clark and Cowlitz counties only.

3 The Office of the Insurance Commissioner has recently determined that
4 Kaiser has been offering and providing coverage to enrollees who neither live
5 nor work in the service area of Clark and Cowlitz counties. These plans through
6 which these enrollees receive coverage include, but are not limited to,
7 Wahkiakum County - group #16676, Bonneville Hotsprings Resort - group
8 #16311, and the Public Employees Benefits Board also known as PEBB.

9 The Insurance Code provides that “[t]he commissioner must execute his or her
10 duties and must enforce the provisions of this Code.” RCW 48.02.060(2). Given these
11 legislative mandates, the OIC is authorized and required to issue the Cease and Desist
12 Order in this matter with an immediate effective date.

13 Stay is not a matter of right, even if irreparable injury might otherwise result.
14 *Virginian R Co. v. United States*, 272 U.S. 658, 672, 47 S. Ct. 222, 71 L. Ed 463 (1926).
15 WAC 284-02-070(2)(a) states that the Washington Administrative Procedure Act (APA)
16 is applicable to OIC’s administrative proceedings. The APA provides that when a
17 respondent seeks a stay of an agency action based on public health, safety, or welfare
18 grounds, the respondent must demonstrate that: 1) the applicant is likely to prevail on the
19 final disposition; 2) the applicant will suffer irreparable injury without the stay; 3) granting
20 the stay will not substantially harm other parties; and 4) the threat to public health, safety,
21 or welfare is not sufficiently serious to justify the agency action.” RCW 34.05.550(3).

22 A. Kaiser Has Not Demonstrated That It Is Likely To Prevail On The Final
23 Disposition.

24 Kaiser’s sole legal argument in defense of its sale of plans outside its service area
25 is a general statement of disagreement with the OIC’s interpretation of “service area” as
26 applicable to group health plans. The definition of “service area” is provided in the
regulations, which is applicable to all health plans.⁴ See WAC 284-43-130(29), WAC
284-43-110 and WAC 284-43-120. Regardless of Kaiser’s interpretation of the

⁴ The purpose of these regulations are to ensure that a person has access to
needed medical care where they live or work, so that if they had a medical crisis they
could access needed medical services without facing uncovered medical bills or out-of-
network costs.

1 application of service area, Kaiser has already replaced the forms with the correct
2 definition which match the access plan that Kaiser already filed that defines its service
3 area as Clark and Cowlitz counties. Kaiser must conform its actions to its filing.
4 Therefore, Kaiser has not demonstrated that is likely to prevail in the final disposition.

5 B. Kaiser Has Not Demonstrated That It Will Suffer Irreparable Injury Without
6 The Stay

7 Kaiser alleges that it will suffer business harm in issuing termination or
8 discontinuation notices.⁵ Kaiser also alleges that these notices could harm the 23
9 consumers of the Bonneville Hotsprings Resort health plan who will be terminated mid-
10 year, and so cause consumer harm.

11 The allegation of business harm is unsupported by any facts. No data or
12 information was provided demonstrating a concrete impact on Kaiser's business.
13 Additionally, the Order will have no impact on Kaiser's business because it merely
14 requires Kaiser to stop offering plans out of its service area. No enrollees in its service area
15 will be impacted, only potentially those where Kaiser will not be conducting business in
16 the future, therefore there can be no business harm.

17 C. Similarly, The Allegation of Consumer Harm Does Not Support Its Claim of
18 Injury to Kaiser. In Truth, Granting The Stay Will Cause Consumer Harm.

19 Kaiser alleges that early termination of the Bonneville Hotsprings Resort health
20 plan will cause consumer confusion. However, renewal, discontinuation and termination
21 notices are very common for consumers to receive as they are required to receive these
22 types of notices at least yearly to keep consumers up to date with plan information.

23 Additionally, there are only twenty-three (23) members out of Kaiser's service
24 area in the Bonneville Hotsprings Resort employer based group health plan. These health

25 ⁵ According to the information provided to the OIC, only one plan would have a
26 renewal / termination date after December 31, 2015, which is the Bonneville Hotsprings
Resort health plan. This health plan was renewed after the OIC informed Kaiser that it
could not offer these plans and this plan has only twenty-three (23) members outside of
its service area.

1 plans can be purchased and changes to coverage can be made at any time by an employer;
2 they are not restricted to annual renewal like Exchange Health Plans for Individual and
3 Small Groups.

4 The OIC provided for sufficient notice to enrollees when requiring Kaiser to end
5 the Bonneville Hotsprings Resort health plan on December 31, 2015 and in requiring that
6 notices of discontinuation or termination be sent at least ninety (90) days prior to
7 December 31, 2015.⁶ This ninety (90) day notice provides enrollees and the group plan
8 manager sufficient time to change health plans to ensure that members do not experience
9 any lapse in coverage. However, any delay in issuing these notices, such as granting a
10 stay in this matter, allows Kaiser to continue further delay issuing these notices, which
11 will result in little time for consumers to change health plans and ensure that they have
12 coverage. As it is now, the notices should have been issued on October 1, 2015, but these
13 have not been issued due to the request to stay the Order to Cease and Desist. Any further
14 delay in issuing the notices only further causes harm to consumers by shortening the
15 amount of time to change plans.

16 Additionally, Kaiser caused this harm. Had Kaiser not sold plans to people out of
17 its service area, these enrollees would not have a plan that provides inadequate coverage
18 to enrollees who then must travel in order to receive medical care. This is the greater harm
19 that is a burden to enrollees

20 Granting a stay would allow Kaiser to continue to sell plans to Washington
21 consumers without the safeguards of the Insurance Code. To order a stay would prejudice
22 both the OIC, in its ability to perform its duty to protect purchasers of these health care
23 plans, and also the enrollees themselves, who are left without the protections of the OIC
24 regulations.

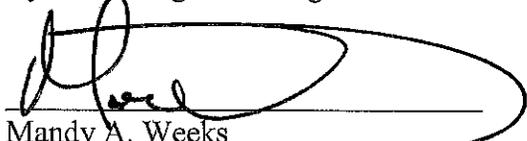
25 _____
26 ⁶ Ninety (90) days notice prior to termination or discontinuation is also required
in accordance with RCW 48.43.035.

V. CONCLUSION

For the foregoing reasons, the OIC respectfully requests that the Chief Presiding Officer deny Kaiser’s Motion to Stay the Order to Cease and Desist.

DATED this 9th day of October, 2015.

MIKE KREIDLER
Insurance Commissioner
By and through his designee


Mandy A. Weeks
Insurance Enforcement Specialist
Legal Affairs Division

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CERTIFICATE OF MAILING

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 served the foregoing OIC'S RESPONSE AND OPPOSITION TO KFHPNW'S MOTION FOR STAY OF CEASE AND DESIST ORDER on the following individuals in the manner indicated:

Via US Mail and Email
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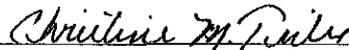
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Washington State Insurance Commissioner

1 5000 Capitol Blvd
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3 hearings@oic.wa.gov

4 **SIGNED** this 9th day of October, 2015, at Tumwater, Washington.

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8 Christine M. Tribe

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