

BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

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HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER

In the Matter of:

**KAISER FOUNDATION HEALTH
PLAN OF THE NORTHWEST**

Docket No. 15-0205

ORDER DENYING KAISER
FOUNDATION HEALTH PLAN OF
THE NORTHWEST'S MOTION FOR
SUMMARY JUDGMENT AND OFFICE
OF THE INSURANCE
COMMISSIONER'S MOTION IN
LIMINE TO CLARIFY ISSUES FOR
HEARING

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This case comes before me on Kaiser Foundation Health Plan of the Northwest's (Kaiser's) Motion for Summary Judgment, and the Office of Insurance Commissioner's (OIC's) Motion in Limine to Clarify Issues for Hearing.

I have considered the Motions filed October 30, 2015; Kaiser's Opposition to OIC's Motion, filed November 13, 2015; OIC's Response to Kaiser's Motion, filed November 13, 2015; Kaiser's

Reply in Support of its Motion, filed November 20, 2015; OIC's Reply in Support of its Motion, filed November 20, 2015; and the declarations and other attachments to such submissions.

Issues.

In their briefing in support of their Motions, the parties present the following issues: (1) Is Kaiser's Demand for Hearing challenging OIC's position that the definition of service area in WAC 284-43-130(29) applies to its large group plans timely under RCW 48.04.010(3), such that OIC's Hearings Unit has jurisdiction to consider the matter? (2) Does WAC 284-43-130(29) require large group plans Kaiser administers to define their service area by county or counties included, not by zip code? (3) If so, has Kaiser demonstrated good cause under WAC 284-43-130(29) which would permit it to define service area by zip code?

Background.

Kaiser is a non-profit corporation that offers health plans to individuals, small groups, and large groups throughout the Northwest, including Washington State. In the large group market, Kaiser sells large group plans to plan sponsors (usually employers). Those large group employers are the policyholders that purchase coverage from Kaiser. Enrollees are the individuals (usually employees and their dependents) enrolled under the policies sold by Kaiser to the policyholders.

Kaiser currently offers coverage to two large group employers, Bonneville Hot Springs Resort and Wahkiakum County, which are located in Washington State outside of Clark and Cowlitz counties. Kaiser also offers coverage to 79 additional large group employers, including the Public Employees Benefits Board (PEBB), that are located in Clark and/or Cowlitz counties, but have certain employees who live outside those two counties. Specifically, 590 total employees of those 79 employers fall into this category. Kaiser lacks access to data regarding how many of those employees work within Clark or Cowlitz counties.

On April 1, 2015, OIC issued Kaiser an Objection Letter in the System for Electronic Rate and Form Filing (SERFF) with respect to Kaiser's Group Health Filing No. KFNW-129667876, which stated under Objection 2:

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

On September 2, 2015, the Office of Insurance Commissioner ("OIC") issued an Order To Cease and Desist, No. 15-0205 ("Order") to Kaiser, ordering Kaiser to immediately cease and desist from:

- Offering, selling, or renewing any plans to any consumer that neither lives nor works in Kaiser's service area of Clark and Cowlitz counties;
- By December 31, 2015, providing coverage to current enrollees that neither live nor work in Clark and Cowlitz Counties.

The Order also mandated that before September 16, 2015 Kaiser report to the OIC the following information concerning plans offered or sold to consumers who neither live nor work in Clark and Cowlitz counties: The number of plans offered or sold, number of enrollees in such plans, the premiums charged enrollees, and an estimate of all current out-of-pocket expenses incurred by such enrollees to date. The Order also required that Kaiser draft a lawful discontinuation notice of such plans, and submit such draft to the OIC for approval, informing such enrollees that on December 31, 2015 their coverage would cease. Following OIC approval, Kaiser would timely issue such notice to enrollees.

On September 25, 2015, Kaiser submitted a Demand for Hearing challenging the Order. Kaiser argues that the Order is disruptive and harmful to members in its health plans, since many of them are enrolled in plans that run through June 2016. Kaiser notes that since the Order requires them to discontinue by December 31, 2015 plans for members who neither live nor work in Clark or Cowlitz, this would cause significant disruption and hardship to such members and their employers, who may not have an alternative health plan.

Kaiser also argues that the Order is overbroad in that it requires Kaiser to send discontinuation notices directly to 590 members because they have an address outside Kaiser's service area, even though several of those members may still be eligible for coverage because they work inside the service area. Kaiser also asserts that the OIC did not object to its large group filings (and the service areas with partial counties) until seven months after it filed them with the OIC. Kaiser also argues that, aside from the definition of "service area" in WAC 284-43-130(29), which it reasons the OIC erroneously applies to large group plans such as theirs, its plans afford members access to adequate health care. Finally, Kaiser argues that contrary to what is stated in the Order, its plans comply with the general network access regulation (WAC 284-43-200), and the statutory requirement that its members have access to appropriate health care services (RCW 48.43.515).

OIC's Motion in Limine.

At 4:19 of its Motion, OIC states that the issue of whether Kaiser improperly defined its service area using zip codes is not properly before the undersigned, since Kaiser did not timely appeal OIC's April 1, 2015 Objection Letter in SERFF. To the OIC, this represents a jurisdictional flaw in Kaiser's Demand for Hearing and Motion per RCW 48.04.010. OIC's Motion, 4:22-23. OIC further argues at 5:18-19 of its Motion that the Order OIC issued simply enjoins Kaiser's unlawful sale of plans outside the service area Kaiser selected and filed with the OIC (i.e., Cowlitz and Clark counties).

OIC states in its Motion that it requests an order limiting the issue in this matter to whether Kaiser has shown cause why the Order should be stayed, which has already been decided. Motion, 6:1-3.

At 3:19-23 of its Reply OIC asserts: "A motion in limine is appropriate to resolve issues prior to hearing and operates similar to a motion for summary judgment." (Emphasis added, citing to *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 943 P.2d 286 (1997)). I disagree with this statement by the OIC. As explained in *Nivens*, just before trial, respondent moved for an order excluding expected testimony that it should have hired security guards and failed to do so. *Id.* at 288. The trial court granted the motion, and immediately thereafter appellant informed the trial court that "he did not wish to proceed to trial because granting the motion in limine amounted to summary judgment for [respondent]." *Id.* (Brackets added). Appellant asserted this because its claim was based solely on the failure of respondent to hire security personnel to deal with loitering. *Id.* The trial court eventually entered an order on summary judgment in favor of respondent since appellant consented to it and asserted it would not bring a claim against respondent on other grounds. *Id.* at 289. The *Nivens* decision at no time indicated that a motion in limine operates like a motion for summary judgment, but rather recognized that by granting the motion in limine appellant's claims had no evidentiary basis, and granting summary judgment in favor of appellant was proper (and which appellant consented to).

The specific purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation. *State v. Evans*, 96 Wn.2d 119, 123, 634 P.2d 845 (1981). The trial court should grant such a motion if it describes the evidence which is sought to be excluded with sufficient specificity to enable the trial court to determine that it is clearly inadmissible under the issues as drawn or which may develop during the trial, and if the evidence is so prejudicial in its nature that the moving party should be

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spared the necessity of calling attention to it by objecting when it is offered during the trial. *Fenimore v. Donald M. Drake Const. Co.*, 87 Wn.2d 85, 91, 549 P.2d 483 (1976); *Douglas v. Freeman*, 117 Wn.2d 242, 255, 814 P.2d 1160 (1991).

Kaiser correctly points out at 4:15-18 of its Opposition that the OIC fails to articulate why any particular evidence or testimony would be inadmissible at a hearing, or how the OIC would be prejudiced by objecting to the admissibility of evidence at the hearing. Kaiser also correctly points out at 4:21-25 of its Opposition that the OIC, rather than seeking to exclude evidence to be offered by Kaiser, is simply requesting a dispositive ruling on Kaiser's Demand for Hearing, and that a motion in limine is not the appropriate vehicle. That said, OIC's Motion asks the undersigned to dismiss Kaiser's Demand for Hearing based on lack of subject matter jurisdiction, since Kaiser allegedly did not timely demand a hearing following OIC's SERFF objection filed on April 1, 2015 (i.e., by June 30, 2015).

RCW 48.04.010 addresses the time limits on demands for hearing stemming from action or inaction by the Insurance Commissioner, including written orders of the commissioner, and states in part:

(1) The commissioner may hold a hearing for any purpose within the scope of this code as he or she may deem necessary. The commissioner shall hold a hearing:

(a) If required by any provision of this code; or

(b) Except under RCW 48.13.475, 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) Any such demand for a hearing shall specify in what respects such person is so aggrieved and the grounds to be relied upon as basis for the relief to be demanded at the hearing.

(3) Unless a person aggrieved by a written order of the commissioner demands a hearing thereon within ninety days after receiving notice of such order, or in the case of a licensee under Title 48 RCW within ninety days after the commissioner has mailed the order to the

licensee at the most recent address shown in the commissioner's licensing records for the licensee, the right to such hearing shall conclusively be deemed to have been waived.

(Emphasis added).

WAC 284-02-070(1)(b) specifically addresses how one demands a hearing before the OIC Hearings Unit, and states in part:

Under RCW 48.04.010 the commissioner is required to hold a hearing upon demand by any person aggrieved by any act, threatened act, or failure of the commissioner to act, if the failure is deemed an act under the insurance code or the Administrative Procedure Act.

(i) A hearing can also be demanded by an aggrieved person based on any report, promulgation, or order of the commissioner.

(ii) Demands for hearings must be in writing and delivered to the Tumwater office of the OIC by mail, hand delivery, facsimile, or e-mail. Unless a person aggrieved by an order of the commissioner demands a hearing within ninety days after receiving notice of that order, or in the case of persons or entities authorized by the OIC to transact the business of insurance under Title 48 RCW, within ninety days after the order was mailed to the most recent address shown in the OIC's licensing records, the right to a hearing is conclusively deemed to have been waived. A hearing is considered demanded when the demand for hearing is received by the commissioner.

(Emphasis added).

As stated in *Tesoro Refining and Marketing Co. v. Dep't of Revenue*, 164 Wn.2d 310, 317, 190 P.3d 28 (2008): "The goal of statutory interpretation is to carry out the legislature's intent. *Burns*, 161 Wash.2d at 140, 164 P.3d 475. If the meaning of the statute is plain, the court discerns legislative intent from the ordinary meaning of the words." The rules of statutory construction apply to agency regulations as well as statutes. *Tesoro Refining and Marketing Co. v. Dep't of Revenue*, 164 Wn.2d 310, 322, 190 P.3d 28 (2008); *Madre v. Health Care Auth.*, 149 Wn.2d 458, 472, 70 P.3d 931 (2003). Recently, the courts in Washington clarified that the plain meaning rule used in Washington also encompasses related statutes:

Additionally, while traditional plain language analysis of statutes focused exclusively on the language of the statute, this court recently has also recognized that "all that the Legislature has said in the statute and related statutes" should be part of plain language analysis. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.* 146 Wn.2d 1, 11, 43 P.3d 4 (2002).

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Cerrillo v. Esparza, 158 Wn.2d 194, 142 P.3d 155, 159 (2006).

The language of both RCW 48.04.010(3) and WAC 284-02-070(1)(b)(ii) is clear that the ninety day period for a party to timely file a demand for hearing commences upon OIC's issuance of a written order to that party. While "order" is not defined in either provision, we find guidance in what an order entails in RCW Ch. 34.05, and specifically the provisions concerning adjudicative proceedings.

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. Two specific types of hearings are conducted pursuant to the Administrative Procedure Act: Rule-making hearings and adjudicative proceedings." (Emphasis added). WAC 284-02-070(2)(a) further opines: "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." (Emphasis added). RCW 34.05.010(1) defines "adjudicative proceeding" as:

[A] proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency. Adjudicative proceedings also include all cases of licensing and rate making in which an application for a license or rate change is denied except as limited by RCW 66.08.150, or a license is revoked, suspended, or modified, or in which the granting of an application is contested by a person having standing to contest under the law.

(Emphasis and brackets added).

RCW 34.05.010(11)(a) defines "order" as: "[W]ithout further qualification, means a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons." Specifically though with respect to the jurisdictional question OIC poses as to the timeliness of Kaiser's Demand, RCW 34.05.010(5) states: "'Entry' of an order means the signing of the order by all persons who are to sign the order, as an official act indicating that the order is to be effective." (Emphasis added).

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At 4:9-11 of its Reply, OIC asserts that a disposition within SERFF is a final order that must be appealed within 90 days of issuance, and specifically cites to Order on OIC Staff's Motion for Summary Judgment in *In the Matter of Leo J. Driscoll and Mary T. Driscoll*, Docket No. 14-0187, as support for this proposition. However, the order at issue in Docket No. 14-0187 (OIC Exhibit 4 in Support of its Motion for Summary Judgment therein) was labeled a "Disposition", with a disposition date, and an implementation date or effective date, 60 days later. The order in that matter approved a rate increase for long term care insurance more than two years after the insured received notice of the approved rate increase. However, the Objection Letter that OIC issued Kaiser on April 1, 2015 (See Declaration of Linda Broyles in Support of Response and Opposition Kaiser's Motion to Stay, dated October 9, 2015, Ex. 7, p.40) does not include an effective date, but rather a date of the objection letter, with a respond by date a week later. This is not unusual, given that as Kaiser explains at 6:11-17 of its Opposition, WAC 284-44A-010(7) contains the following definition of an "objection letter" in SERFF:

- Correspondence created in SERFF and sent by the commissioner to the filed that:
- (a) Requests clarification, documentation or other information;
 - (b) Explains errors or omissions in the filing; or
 - (c) Disapproves a form under RCW 48.44.020 or 48.44.070.

The Disposition OIC created in SERFF in Docket No. 14-0187 involved the entry of an order under RCW 34.05.010(5), thus triggering the opportunity for an adjudicative proceeding under RCW 34.05.010(1) and 90-day timeframe in RCW 48.04.010(3) and WAC 284-02-070(1)(b)(ii). OIC's issuance of the Objection Letter in this matter did not, since it was correspondence without an effective date, and not signed by the relevant parties.

However, the OIC did enter the Order on September 2, 2015, since it was signed and effective on a date certain, thus triggering the opportunity for an adjudicative proceeding under RCW 34.05.010(1) and the 90-day timeframe in RCW 48.04.010(3) and WAC 284-02-070(1)(b)(ii), which

Kaiser complied with. Since Kaiser's Demand for Hearing challenging OIC's position that the definition of service area in WAC 284-43-130(29) applies to its large group plans was timely under RCW 48.04.010(3), the OIC's Hearings Unit has jurisdiction to consider the matter. We now address Kaiser's arguments concerning the definition of service area under the summary judgment standard.

Summary Judgment Standard.

WAC 10-08-135, which governs motions for summary judgment in administrative proceedings, provides:

A motion for summary judgment may be granted and an order issued 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.

In ruling on a motion for summary judgment, the court must consider the material evidence and all reasonable inferences therefrom most favorably for the nonmoving party and, when so considered, if reasonable people might reach different conclusions, the motion should be denied. *Jacobsen v. State*, 89 Wn.2d 104, 108-109, 569 P.2d 1152 (1977). See also *Fleming v. Stoddard Wendle Motor Co.*, 70 Wn.2d 465, 467, 423 P.2d 926 (1967).

Since OIC is the nonmoving party in considering Kaiser's Motion, I will consider material evidence in the record in the manner most favorable to the OIC. And if reasonable persons might reach different conclusions given the evidence, then Kaiser's Motion must be denied.

Whether the definition of service area in WAC 284-43-130(29) applies to Kaiser's large group plans.

RCW 48.43.515(1) requires that "each enrollee in a health plan must have adequate choice among health care providers." WAC 284-43-200 addresses network adequacy for health plans and introduces the concept of service area, and provides in part:

(1) An issuer must maintain each provider network for each health plan in a manner that is sufficient in numbers and types of providers and facilities to assure that, to the extent feasible based on the number and type of providers and facilities in the service area, all

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health plan services provided to enrollees will be accessible in a timely manner appropriate for the enrollee's condition. An issuer must demonstrate that for each health plan's defined service area, a comprehensive range of primary, specialty, institutional, and ancillary services are readily available without unreasonable delay to all enrollees and that emergency services are accessible twenty-four hours per day, seven days per week without unreasonable delay.

(2) Each enrollee must have adequate choice among health care providers, including those providers which must be included in the network under WAC 284-43-205, and for qualified health plans and qualified stand-alone dental plans, under WAC 284-43-222.

(3) An issuer's service area must not be created in a manner designed to discriminate or that results in discrimination against persons because of age, gender, gender identity, sexual orientation, disability, national origin, sex, family structure, ethnicity, race, health condition, employment status, or socioeconomic status.

(4) An issuer must establish sufficiency and adequacy of choice of providers based on the number and type of providers and facilities necessary within the service area for the plan to meet the access requirements set forth in this subchapter. Where an issuer establishes medical necessity or other prior authorization procedures, the issuer must ensure sufficient qualified staff is available to provide timely prior authorization decisions on an appropriate basis, without delays detrimental to the health of enrollees.

(Emphasis added). The phrase "service area" is defined in WAC 284-43-130(29) as:

[T]he geographic area or areas where a specific product is issued, accepts members or enrollees, and covers provided services. A service area must be defined by the county or counties included unless, for good cause, the commissioner permits limitation of a service area by zip code. Good cause includes geographic barriers within a service area, or other conditions that make offering coverage throughout an entire county unreasonable.

(Brackets added).

WAC 284-43-110 explains that the purpose of WAC Ch. 284-43, including the definition of "service area" above "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." (Emphasis added). WAC 284-43-120 emphasizes the broad application of WAC Ch. 284-43, and adds in part:

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. Health carriers are responsible for compliance with the provisions of this chapter and are responsible for the compliance of any person or organization acting on behalf of or at the direction of the carrier, or acting pursuant to carrier standards or requirements concerning the coverage of, payment for, or provision of health care services. A carrier may not offer as

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a defense to a violation of any provision of this chapter that the violation arose from the act or omission of a participating provider or facility, network administrator, claims administrator, or other person acting on behalf of or at the direction of the carrier, or acting pursuant to carrier standards or requirements under a contract with the carrier rather than from the direct act or omission of the carrier.

(Emphasis added).

Kaiser does not argue that its large group health plans are not subject to the jurisdiction of the state of Washington, or are excluded from being considered health plans. Rather, Kaiser states at 3:3-6 of its Motion and 2:13-17 of its Opposition, that it informs policyholders it contracts with that only eligible employees and dependents may be offered enrollment in Kaiser's plans; and that it relies on those policyholders to offer the large group plans only to those employees and their dependents who are actually eligible. Under WAC 284-43-120, this is clearly not a defense to allegations OIC makes concerning service area. The law is clear that large group plans Kaiser administers are health plans governed by both RCW Ch. 48.43 and WAC Ch. 284-43. RCW 48.43.005(26) defines "health plan" or "health benefit plan" as:

[A]ny policy, contract, or agreement offered by a health carrier to provide, arrange, reimburse, or pay for health care services except the following:

- (a) Long-term care insurance governed by chapter 48.84 or 48.83 RCW;
- (b) Medicare supplemental health insurance governed by chapter 48.66 RCW;
- (c) Coverage supplemental to the coverage provided under chapter 55, Title 10, United States Code;
- (d) Limited health care services offered by limited health care service contractors in accordance with RCW 48.44.035;
- (e) Disability income;
- (f) Coverage incidental to a property/casualty liability insurance policy such as automobile personal injury protection coverage and homeowner guest medical;
- (g) Workers' compensation coverage;
- (h) Accident only coverage;
- (i) Specified disease or illness-triggered fixed payment insurance, hospital confinement fixed payment insurance, or other fixed payment insurance offered as an independent, noncoordinated benefit;
- (j) Employer-sponsored self-funded health plans;
- (k) Dental only and vision only coverage; and
- (l) Plans deemed by the insurance commissioner to have a short-term limited purpose or duration, or to be a student-only plan that is guaranteed renewable while the covered person

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is enrolled as a regular full-time undergraduate or graduate student at an accredited higher education institution, after a written request for such classification by the carrier and subsequent written approval by the insurance commissioner.

(Brackets and emphasis added). WAC 284-43-130(15) contains a slightly different, yet very similar, definition of “health plan” or “plan”, which reads:

[A]ny individual or group policy, contract, or agreement offered by a health carrier to provide, arrange, reimburse, or pay for health care service except the following:

- (a) Long-term care insurance governed by chapter 48.84 RCW;
- (b) Medicare supplemental health insurance governed by chapter 48.66 RCW;
- (c) Limited health care service offered by limited health care service contractors in accordance with RCW 48.44.035;
- (d) Disability income;
- (e) Coverage incidental to a property/casualty liability insurance policy such as automobile personal injury protection coverage and homeowner guest medical;
- (f) Workers' compensation coverage;
- (g) Accident only coverage;
- (h) Specified disease and hospital confinement indemnity when marketed solely as a supplement to a health plan;
- (i) Employer-sponsored self-funded health plans;
- (j) Dental only and vision only coverage; and
- (k) Plans deemed by the insurance commissioner to have a short-term limited purpose or duration, or to be a student-only plan that is guaranteed renewable while the covered person is enrolled as a regular full-time undergraduate or graduate student at an accredited higher education institution, after a written request for such classification by the carrier and subsequent written approval by the insurance commissioner.

(Brackets and emphasis added).¹

The rule of *expressio unius est exclusio alterius* is applicable here. This rule is explained in *Clark County Public Utility Dist. No. 1 v. Dep't of Revenue*, 153 Wn. App. 737, 747, 222 P.3d 1232 (2009):

We adhere to the rule of *expressio unius est exclusio alterius*, or specific inclusions exclude implication. Black's Law Dictionary 661 (9th ed. 2009). If a statute specifically designates

¹ RCW 48.43.005(25) defines “health carrier” or “carrier” as:

[A] disability insurance company regulated under chapter 48.20 or 48.21 RCW, a health care service contractor as defined in RCW 48.44.010, and a health maintenance organization as defined in RCW 48.46.020, and includes “issuers” as that term is used in the Patient Protection and Affordable Care Act (P.L. 111-148, as amended (2010)).

(Brackets added). See also WAC 284-43-130(14).

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the things on which it operates, we infer that the legislature intended all omissions. *In re Pers. Restraint of Bowman*, 109 Wn.App. 869, 875, 38 P.3d 1017 (2001), *review denied*, 146 Wn.2d 1001, 56 P.3d 566 (2002).

Western Telepage, Inc. v. City of Tacoma, 140 Wn.2d 599, 611, 998 P.2d 884 (2000) further elaborates on this rule and states that it applies when an item is not expressly excluded from a broad definition:

As we have noted, the mention of one thing implies the exclusion of others, under the maxim “*expressio unius est exclusio alterius*.” *State ex rel. Port of Seattle v. Department of Public Serv.*, 1 Wn.2d 102, 95 P.2d 1007 (1939). Thus, where the Legislature did not expressly exclude paging services from the broad definition of network telephone services in RCW 82.04.065(4), it must be assumed the Legislature did so intentionally.

Both RCW 48.43.005(26) and WAC 284-43-130(15) include a specific list of group policies, contracts or agreements that provide, arrange, reimburse, or pay for health care service, that are excepted from being a “health plan” or “plan”. No specific mention is made of large group plans being excluded from those terms, and under the maxim *expressio unius est exclusio alterius*, we must assume that the Legislature did so intentionally. In fact, WAC 284-43-130(21) defines “network”, and specifically mentions large group plans, and states:

[T]he group of participating providers and facilities providing health care services to a particular health plan or line of business (individual, small, or large group). A health plan network for issuers offering more than one health plan may be smaller in number than the total number of participating providers and facilities for all plans offered by the carrier.

(Brackets and emphasis added).

Where the legislature uses certain statutory language in one instance, and different language in another, there is a difference of legislative intent. *United Parcel Service, Inc. v. Dep’t of Revenue*, 102 Wn.2d 355, 362, 687 P.2d 186 (1984); *Agrilink Foods, Inc. v. Dep’t of Revenue*, 153 Wn.2d 392, 397, 103 P.3d 1226 (2005). In other words, the Legislature could have chosen to exclude mention of large group plans from the definition of “health plan” or “plan”, but did not do so.

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Therefore, contrary to Kaiser's assertion at 14:10-11 of its Motion that "there is no clear indication in the applicable Washington statutes or regulations that the service area definition applies to large group plans," reasonable minds might reach different conclusions given the statutory and regulatory analysis above. Agency rules are de facto authoritative for the public until the public challenges them in court and the court agrees. *Ass'n of Washington Business v. Dep't of Revenue*, 155 Wn.2d 430, 448, 120 P.3d 46 (2005). For these reasons, with regard to whether large group plans are governed by WAC 284-43-130(29), Kaiser's Motion is denied. We now turn to the question of whether Kaiser has shown good cause to define service area by zip codes rather than by counties.

Whether the Kaiser has shown good cause under WAC 284-43-130(29) such that its service areas can be defined by zip code rather than by counties.

To reiterate, the phrase "service area" is defined in WAC 284-43-130(29) as:

[T]he geographic area or areas where a specific product is issued, accepts members or enrollees, and covers provided services. A service area must be defined by the county or counties included unless, for good cause, the commissioner permits limitation of a service area by zip code. Good cause includes geographic barriers within a service area, or other conditions that make offering coverage throughout an entire county unreasonable.

(Brackets and emphasis added).

The phrase "good cause" is not defined in the regulation above. However, the notion of what constitutes good cause has been addressed in case law. With regards to good cause in the unemployment context, and whether a claimant is entitled to benefits, it was stated in *Cowles Publishing Co. v. Employment Security Dep't*, 15 Wn. App. 590, 550 P.2d 712 (1976):

Unemployment was forced upon the claimant by these external circumstances, thereby creating good cause for voluntary unemployment and entitling the claimant to benefits under RCW 50.20.050.

Cowles Publishing, 15 Wn. App. at 594-95 (emphasis added). In a footnote, the Court of Appeals further explains:

Another example of the second category of unemployment fault, third-party fault, is *Matison v. Hutt*, 85 Wash.2d 836, 539 P.2d 852 (1975). Union members voluntarily quit

employment when their employer became a nonunion house. Under the facts of the case, to continue employment with the nonunion employer would mean the loss of union health, welfare, and pension benefits. Again it was found that entirely external circumstances had compelled the employees to voluntarily quit. Fault being with the union and external to the claimants, their voluntary unemployment was for good cause, entitling them to unemployment benefits under RCW 50.20.050.²

Cowles Publishing, 15 Wn. App. at 594-95 n.9 (emphasis added).

While I would agree with Kaiser's statement at 20:15-17 of its Motion that geographic barriers within a service area present only one instance of good cause, and that other conditions may qualify, the case law is clear that external circumstances not of the carrier's or issuer's own doing have to be the root of good cause.

Kaiser asserts at 20:20-23 of its Motion that since it contracts with many large group policyholders located in Clark and Cowlitz counties that have employees who live and work just over the borders of those counties, it would be unreasonable to require a service area to encompass entire adjacent counties for this reason. This is clearly not a circumstance external to Kaiser justifying good cause under WAC 284-43-130(29). To reiterate, Kaiser states at 3:3-6 of its Motion and 2:13-17 of its Opposition that it informs policyholders it contracts with that only eligible and dependents may be offered enrollment in Kaiser's plans; and that it relies on those policyholders to offer the large group plans only to those employees and their dependents who are actually eligible (i.e., in Clark or Cowlitz counties). Under WAC 284-43-120, this clearly does not represent good cause.

As to whether Kaiser has demonstrated good cause under WAC 284-43-130(29), reasonable

² RCW 50.20.050 states:

An individual shall be disqualified from benefits beginning with the first day of the calendar week in which he or she has left work voluntarily without good cause and thereafter for seven calendar weeks and until he or she has obtained bona fide work in employment covered by this title and earned wages in that employment equal to seven times his or her weekly benefit amount.

minds might reach different conclusions given the analysis above. For that reason, as to this issue, Kaiser's Motion is denied.

Ruling.

Both Kaiser and OIC's Motions are denied. The parties shall proceed with the evidentiary hearing on this matter per the date, time, and location agreed to.

Dated: December 7, 2015



William G. Pardee
Presiding Officer

Pursuant to RCW 34.05.461(3), the parties are advised that they may seek reconsideration of this order by filing a request for reconsideration under RCW 34.05.470 with the undersigned within 10 days of the date of service (date of mailing) of this order. Further, the parties are advised that, 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.

Declaration of Mailing

I declare under penalty of perjury under the laws of the State of Washington that on the date listed below, I mailed or caused delivery through normal office mailing custom, a true copy of this document to the following people at their addresses listed above: Robin L. Larmer, Karin D. Jones, Mike Kreidler, James T. Odiorne, J.D., CPA, John F. Hamje, AnnaLisa Gellermann, and Mandy Weeks.

DATED this 7th day of December, 2015.



DOROTHY A. SEABOURNE-TAYLOR