FILED
2016 MAR -1 A 8:28
HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER

BEFORE THE STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

IN THE MATTER OF:	Docket No. 15-0290
WASHINGTON TECHNOLOGY INDUSTRY ASSOCIATION ("WTIA") - DISAPPROVAL OF APPLICATION TO OPERATE SELF-FUNDED MEWA No. 15-0290	WTIA'S MOTION FOR RECONSIDERATON

Pursuant to RCW 34.05.461(3) and 34.05.470, Washington Technology Industry Association ("WTIA") requests that the Presiding Officer of the Office of the Insurance Commissioner ("OIC") reconsider the order denying WTIA's cross-motion for summary judgment and granting the OIC's ("the Order"). The OIC has not promulgated specific procedures governing reconsideration of its officers' decisions, but the subject is covered in the Administrative Procedure Act (APA). *See* WAC 284-02-070. And, under the APA's rules, a petition for reconsideration states a basis of relief to the extent it demonstrates that legal error occurred. *In Re Application P-72389 of Thomas C. Kolean & James B. Stewart, d/b/a Olympic Transp., for Permit to Operate As A Common Carrier.*, 140273, 1989 WL 1785212, at *1 (Sept. 20, 1989). For the reasons set forth below, WTIA respectfully submits that the Order was based on an error of law.

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

I. ARGUMENT AND AUTHORITY

In the Order, the Presiding Officer stated that "[t]he language of RCW 48.125.030(8) ["the seasoning requirement"] is clear that the OIC may only issue a [certificate of authority] to operat[e] in the state of Washington to an existing arrangement (i.e., self-funded MEWA) that meets the seasoning requirement." Order at 7. The Presiding Officer further indicated that the seasoning requirement could only be satisfied by a MEWA that was self-funded at the time of RCW Chapter 148.125's enactment. *Id.* The Presiding Officer reached this result by reading into the seasoning requirement RCW 48.125.010(7) (".010(7)"), which indicates that Chapter 48.125 uses the phrase "self-funded MEWA" and the term "arrangement" interchangeably.

As laid out by WTIA in its underlying cross-motion for summary judgment, one plausible interpretation of the seasoning requirement is that it has no bearing on WTIA's application, inasmuch as the section only purports to apply to certificate of authority applications by self-funded MEWAs, and WTIA is not a self-funded MEWA. *See* WTIA's Opposition to OIC's Motion For Summary Judgment 2. But, even assuming, without admitting, that the Presiding Officer was correct in determining that the seasoning requirement applied to the WTIA, it would not bar WTIA's application—the Presiding Officer's incorporation of .010(7) into the seasoning requirement was based upon legal error. As explained herein, the Legislature has plainly instructed that .010(7) is not to be indiscriminately applied to RCW 48.125 where the context clearly requires otherwise, RCW 48.125.010, and legislative history and absurdity are context that must be considered. *State v. Sweat*, 174 Wn. App. 126, 131, 297 P.3d 73, 76 (2013) aff'd, 180 Wn. 2d 156, 322 P.3d 1213 (2014); *State v. Heath*, 168 Wn. App. 894, 900, 279 P.3d 458, 461 (2012); *In re Farina*, 94 Wash. App. 441, 459, 972 P.2d 531, 541 (1999), as amended on reconsideration (Apr. 13, 1999). The legislative history of RCW 48.125, along with the absurdity resulting from the OIC's reading of the seasoning requirement, instruct that .010(7)should not be read therein.

82686343.2 0054905-00001

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

A. Because neither legislative history nor absurd results are "extrastatutory conditions," they may properly be considered as context in statutory interpretation

The Presiding Officer correctly agreed that, pursuant to RCW 48.125.010 (the "savings clause"), if context clearly demonstrated, .010(7) should not be read into the seasoning requirement. Order at 14. But, citing *Bain v. Metro. Mortgage Grp., Inc.*, 175 Wash. 2d 83, 100, 285 P.3d 34, 42 (2012), the Presiding Officer noted that he could not consider "extrastatutory conditions" as context to the seasoning requirement under the savings clause, and suggested that WTIA's motion for summary judgment had asked that he do so. This conclusion was in error.

True, in *Bain*, the Washington Court of Appeals determined that, even where a savings clause exists, a tribunal may not consider extrastatutory conditions as context in statutory interpretation. But the condition that the court identified as extrastatutory in *Bain* was a contract between the parties to the action, which the court had been asked to use to alter statutory provisions as applied to the parties. 175 Wash. 2d at 100. WTIA placed no such request upon the Presiding Officer in the underlying motion. Instead, WTIA pointed to the legislative history and evidence of intent supporting its position, as well as the absurdity resulting from the OIC's, all of which may properly be considered as statutory context where a definition is modified by the savings clause at issue here. *See State v. Sweat*, 174 Wn. App. 126, 131, 297 P.3d 73, 76 (2013) aff'd, 180 Wn. 2d 156, 322 P.3d 1213 (2014); *State v. Heath*, 168 Wn. App. 894, 900, 279 P.3d 458, 461 (2012); *In re Farina*, 94 Wash. App. 441, 459, 972 P.2d 531, 541 (1999), as amended on reconsideration (Apr. 13, 1999).

B. The legislative history does not support the Presiding Officer's decision

If, pursuant to the savings clause, the Presiding Officer had properly considered RCW 48.125's legislative history as context for the seasoning requirement, he would have noted that said history runs contrary to the OIC's interpretation. For instance, the Bill Analysis from the Financial Institutions and Insurance Committee explains that under RCW 48.125, "[a] 'self-funded MEWA' is defined . . . as a MEWA that does not provide for payment of benefits solely

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

through a policy or policies of insurance issued by one or more licensed insurers." *See* Decl. of Kiran H. Griffith In Support of Motion for Summary Judgment by WTIA ("Griffith Decl.") (emphasis added), Ex. 7 p. 2; *see also* Griffith Decl. Ex. 8 p. 3 (accord). This demonstrates that the Committee was aware of the distinction between self-funded MEWAs and MEWAs as a broader category, and capable of clearly differentiating between the two in its discussion thereof. Thus, the Committee's omission of the "self-funded" qualifier from its subsequent explanation of the seasoning requirement—"*a MEWA* must have been in existence and actively operated . . . for at least 10 years as of December 31, 2003"—would seem to have been intentional. *See* Griffith Decl., Ex. 7 p. 2 (emphasis added); *see also* Griffith Decl. Ex. 8 p. 3 (accord). Context thus suggests that the Legislature viewed the seasoning requirement as requiring only that an entity be operating as a MEWA—with no requirement that those operations be self-funded—for at least 10 years prior to December 31, 2003.

In support of his contrary conclusion that RCW 48.125 was only intended to apply to the "limited universe of [self-funded] MEWAs" then in existence, the Presiding Officer pointed to a passage in the Bill Report wherein the Committee considering the bill stated "[t]he bill's proponents initially identified one MEWA to which [its] provisions would apply. At least three other MEWAs have been identified during the legislative process." Order at 9; *see* Griffith Decl., Ex. 8 p. 8. But in reading this legislative history, the Presiding Officer failed to take into account that the Committee only made the statements to express concern over the proponents' failure to thoroughly investigate the reach of the bill—a reach that the Committee plainly thought was far broader than the four entities it had identified. *See* Griffith Decl., Ex. 8 p. 8 (listing the statement under "Concerns"). Indeed, the Committee acknowledged therein, "[W]e do not know the full scope of this bill." *Id.* Surely, if the Committee believed that the bill only applied to then self-funded MEWAs, its reach would have been readily discoverable; such entities were already subject to the OIC's scrutiny. *See* Griffith Decl. Ex. 8 p. 7.

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

Even more telling is that nowhere in these statements—in fact, nowhere in the legislative history to which the Presiding Officer cites—does the Committee express an understanding that the MEWAs to which the bill applied were then self-funded. To the contrary, throughout the Bill Report, the Committee differentiated between self-funded and fully-insured MEWAs. *See* Griffith Decl., Ex. 8 p. 2 ("A 'self-funded' MEWA is defined for the purposes of state law as a MEWA that does not provide for payment of benefits solely through a policy or policies of insurance issued by one or more licensed insurers."). And, in identifying the MEWAs that would be subject to Chapter 48.125's precepts, the Committee clearly omitted the former qualification. Griffith Decl., Ex. 8 p. 8.

Thus, properly considered as context to the seasoning requirement, the legislative history weighs against the OIC's interpretation of the section. The Presiding Officer made a legal error in deciding otherwise.

C. The absurdity resulting from the OIC's reading likewise weighs against incorporating .010(7) into the seasoning requirement

The Presiding Officer should also have considered the absurdity resulting from the OIC's reading of .010(7) into the seasoning requirement as context counseling inappositely. As the Presiding Officer admits, this reading effectively precludes any new self-funded MEWA from being established. And it is simply not reasonable to suggest that the Legislature would have chosen to accomplish this sweeping ban on new self-funded MEWAs by mere implication—that is, the reading-in of a different provision to a remote statutory subsection. Indeed, what the Presiding Officer now reads as a complete prohibition on the establishment of new MEWAs was so neatly tucked away and obscured that the OIC itself apparently did not understand the seasoning requirement as having this effect. Had the OIC thought that to be the case, it most certainly would not have denied WTIA's initial application on the grounds that it was not properly completed. Indeed, until the second denial, the OIC never intimated that WTIA was in

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

fact barred from applying in the first instance. *See* Decl. of Michael Monroe In Support of Motion for Summ. J. by WTIA, Ex. 11.

Moreover, reading .010(7) into the seasoning requirement wholesale results in mutually conflicting, but necessary, conditions to establishing a self-funded MEWA. To wit—pursuant to .010(7), an entity only becomes an "arrangement" [that is, a self-funded MEWA] to the extent that it successfully applies for a certificate of authority; but, reading .010(7) into the seasoning requirement, an entity can only successfully apply for a certificate of authority if it is already an arrangement. Such a device would rival in perfect circularity that of the original Catch-22.

The Presiding Officer purported to find absurdity in WTIA's position—namely, that under it "those who were self-funded at the time the Act was made law were required to meet the seasoning requirement, while those who were not, but now want a [certificate of authority], do not." Order at 7. But this is not the case if, as the legislative history suggests, the term arrangement in the seasoning requirement refers to any MEWA, self-funded or not. Under such an interpretation, the seasoning requirement applies to every MEWA seeking a certificate of authority, with no consideration of whether the entity was self-funded at the time of Chapter 48.125's enactment.

That WTIA's reading of the seasoning requirement is therefore immensely more reasonable than that of the OIC's also should have been considered as context by the Presiding Officer. The Presiding Officer committed legal error in failing to do so.

II. CONCLUSION

In sum, even assuming that the Presiding Officer was correct that the seasoning requirement applies to WTIA, it does not bar WTIA's application. Properly read in context, in accordance with the Legislature's instructions, the term "arrangement" in the seasoning requirement is not a stand-in for "self-funded MEWA." Instead, context counsels that, in the seasoning requirement "arrangement" refers to all MEWAs, self-funded or otherwise. So read, the seasoning requirement does not require that the MEWA be self-funded at the time its

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900

"seasoning" occurred. And the Presiding Officer's holding that WTIA was ineligible for a certificate of authority pursuant to the seasoning requirement because it was not self-funded prior to Chapter 48.125's enactment was therefore legal error. In light of this, WTIA respectfully requests that its motion for reconsideration be granted and requests that further administrative proceedings be ordered and undertaken as appropriate.

DATED: March 7, 2016.

STOEL RIVES LLP

Maren R. Norton, WSBA No. 35435
600 University Street, Suite 3600
Seattle, WA 98101
Phone: (206) 624-0900
Facsimile: (206) 386-7599
Email: maren.norton@stoel.com

Attorneys for Washington Technology Industry Association

CERTIFICATE OF SERVICE

I, Leslie Lomax, certify that at all times mentioned herein, I was and am a resident of the state of Washington, over the age of eighteen years, not a party to the proceeding or interested therein, and competent to be a witness therein. My business address is that of Stoel Rives LLP, 3600 One Union Square, 600 University Street, Seattle, Washington 98101.

On March 7, 2016, I caused a copy of the foregoing document to be served upon the following individual(s) in the manner indicated below:

Judge William Pardlee Office of Insurance Commissioner Hearings Unit P.O. Box 40255 Olympia, WA 98504-0255 hearings@oic.wa.gov and c/o Dorothy Seabourne-Taylor Hearings Unit Paralegal DorothyS@oic.wa.gov	☐hand delivery ☐facsimile transmission ☐overnight delivery ☒first class mail ☒e-mail delivery
Charles Brown, Sr. Insurance Enforcement Specialist Darryl Colman Insurance Enforcement Specialist Office of the Insurance Commissioner Legal Affairs Division P.O. Box 40255 Olympia, WA 98504-0255 charles@oic.wa.gov darrylc@oic.wa.gov	☐hand delivery ☐facsimile transmission ☐overnight delivery ☒first class mail ☒e-mail delivery

Executed on March 7, 2016, at Seattle, Washington.

Leslie Lomax

Leslie Lomax

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900