

STATE OF WASHINGTON,  
OFFICE OF THE INSURANCE COMMISSIONER

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In the Matter of )

Hearings Unit Case No. 16-0002

LEO J. DRISCOLL, )  
Applicant )

HEARINGS UNIT  
OFFICE OF  
THE INSURANCE COMMISSIONER  
APPLICANT'S RESPONSE TO  
THE OIC'S DISPOSITIVE MOTIONS

Applicant hereby responds to the OIC's Dispositive Motions as follows:

- I. CR 12(b)(6) has not been adopted by the Insurance Commissioner as a procedure for use in adjudicative proceedings. The provisions of CR12(b)(6) are inapplicable to these proceedings. Applicant does not consent to the employment of CR12(b)(6) in addressing any of the issues in this proceeding.
- II. Applicant's Response to the OIC's Contentions that Applicant's Demand for Hearing Must be Dismissed for Failure to Join MetLife as a Party.
  - A. CR 19 and CR 12(b)(7) Have Not Been Adopted and are Not Applicable to these adjudicative proceedings; No Applicable Law or Regulation Imposed an Obligation on Applicant to Join MetLife as a Party to these Administrative Proceedings; RCW 34.05.434(1) Provides for Intervention by MetLife or Other Persons Affected by the Hearing; On May 2, 2016, Applicant Mailed Notice of the Impending Hearing to MetLife and to T-C Life.
    1. In issuing WAC 284-02-070(2)(e)(i), the Insurance Commissioner adopted and incorporated by reference CR 26 through 37 (with specified exceptions). However, the Commissioner did not adopt CR 12(b)(7) or CR 19 and make such applicable to the procedural or substantive requirements for adjudicative proceedings.
    2. WAC 284-02-070(2) sets forth the "**Procedural and substantive requirements for adjudicative proceedings including contested cases.**" Subsection 2(a) thereof provides: "(a) Provisions applicable to adjudicative proceedings are contained in chapter 48.04 RCW and chapter 34.05 RCW, the Administrative Procedures Act, and chapter 10.08 WAC."
    3. None of those cited laws include a requirement that the applicant for an adjudicative hearing notify a person or party who may be affected by the hearing. WAC 10-08-040(1) in part provides; "(1) In any adjudicative proceeding all parties shall be served with a notice of hearing within the time required by law governing the respective agency or proceeding. If there is no requirement under other law, all parties shall be served with a

notice of hearing not less than seven days before the date set for the hearing. The notice shall include the information specified in RCW 34.05.434.”

4. WAC 10-08-040 does not indicate who the “parties” are that “shall be served with a notice of hearing”. The Notice of Hearing issued by the Presiding Officer dated January 27, 2016 was given only to the applicant with copy of the notice to the Insurance Commissioner and to five other representatives of the Insurance Commissioner. Insofar as known to applicant, none of those parties filed an objection to that notice as being insufficient because it did not include notice to MetLife.
5. The provisions of WAC 284-02-070, of chapter 10.08 WAC, of chapter 48.04 RCW, and of RCW 34.05.434(1), do not state who if anyone is obliged to give notice of an adjudicative hearing to a party who may be affected by the hearing.
6. Regulatory provisions do exist that require notice be given by the agency to those who have filed a *petition to intervene* in such a matter, as follows:
  - RCW 34.05.434(1) provides: “(1) The agency or the office of administrative hearings shall set the time and place of the hearing and give not less than seven days advance written notice to all parties and to all persons who have filed written petitions to intervene in the matter.”
  - WAC 284-02-070 (2)(d)(III) provides: “(iii) The commissioner or the chief presiding officer may allow any person affected by the hearing to be present during the giving of all testimony and will allow the aggrieved person a reasonable opportunity to inspect all documentary evidence, to examine witnesses, and to present evidence. Any person heard must make full disclosure of the facts pertinent to the inquiry under oath.”
7. Insofar as applicant has been able to determine, no regulatory provision exists that requires the applicant in an adjudicative proceeding before the Insurance Commissioner give notice to a person or party that may be affected by or interested in the application filed by that applicant.
8. Nonetheless, on May 2, 2016 applicant mailed written notice to MetLife and to T-C Life that gives each of them notice of the pendency of this proceeding. See APPLICANT’S Exhibit 18 attached to LEO J. DRISCOLL’S DECLARATION DATED MAY 12, 2016 concurrently being filed in these proceedings.
9. The OIC’s argument that applicant’s Demand for Hearing must be dismissed (pp. 8-11 of the OIC’s Motion and Argument) is based on the false premise that applicant was required by law to have joined MetLife as a necessary party in this administrative proceeding. As shown above, there are no rules or laws that

required applicant to have joined MetLife as a party in these proceedings. Applicant should not be sanctioned for failure to perform a non-existent duty.

10. If the notice which applicant mailed to MetLife and T-C Life provides insufficient time for either of them to petition to intervene and/or to attend the scheduled hearing, the regulatory process for that is to submit a request to the Presiding Officer for continuance of the hearing date. WAC 10-08-090.

**B. During the Pre-Hearing Conference, Applicant Did Not Decline To Join MetLife as a Party in these Proceedings; That Was Not Discussed**

11. As stated in Leo J. Driscoll's May 12, 2016 Declaration filed herewith, applicant's recollections of the discussions that took place during the telephonic Pre-Hearing Conference held in these proceedings on January 27, 2016 include these:

- a. Applicant did not then *decline* to join MetLife as a party in these proceedings as now contended by the OIC in the OIC's Motion to Dismiss; applicant recalls that in the Pre-Hearing Conference applicant referred to the provisions of RCW 34.05.434 and suggested that such require ( or may require) the agency to give notice of the hearing to MetLife and to T-C Life.
- b. Further, that the Presiding Officer then addressed the terms of that statute by reading them aloud.
- c. Further that no person participating in that conference then proposed that applicant join MetLife as a party in the proceedings.
- d. OIC's attorney Mandy Weeks participated in the discussions as counsel for the OIC and suggested that applicant's spouse should be a party in such proceedings. Applicant responded in substance and effect that it was not necessary that his spouse be a party in such proceedings.

12. At p. 9, lines 12 to 17, of the OIC's Dispositive Motion, the OIC argues: "By Petitioner's actions to decline joining MetLife in this matter, MetLife has been prevented from protecting its interest in its own rate filings and its interest in the approved premium rates. Furthermore, MetLife has been prevented from defending itself from these accusations. Therefore, MetLife is an indispensable party and this matter must be dismissed for Petitioner's failure to join an indispensable party."

13. The OIC seeks that dismissal notwithstanding that the OIC did not provide a regulatory rule that identifies any person or entity that was required by law to notify MetLife of its' right to intervene in such proceedings. Dismissing applicant's demand for hearing, as proposed by the OIC, would be unjust and inequitable given the OIC's failure to provide a regulatory rule that specified the person or

entity that is to give notice to a party whose interests may be affected by the hearing.

C. OIC's Reliance on *National Homeowners Ass'n v. City of Seattle* is Misplaced;

14. At pp. 10 and 11 of the OIC's Motion and Argument, the OIC cites *National Homeowners Ass'n v. City of Seattle*, 82 Wn. App 640 (Division 1. 1996) as support for the OIC's contentions that applicant's demand for hearing should be dismissed with prejudice because applicant did not join MetLife as a party.

In that litigation, the plaintiff Homeowners Association petitioned the Superior Court to issue a statutory writ of review (a/k/a "writ of certiorari") to challenge the merits of a municipal agency's administrative decision. Plaintiff's original petition was timely, filed within the 15 day time limitation imposed by the Seattle Municipal Code for review of the administrative decision. After that limitation period had expired, plaintiff filed a motion to amend its petition to add additional claims and an additional party defendant (a Living Trust) but did not also seek to add a 2<sup>nd</sup> party ("Eagle") who was known to plaintiff from the outset and who was deemed by the trial court to be a necessary party to the action.

At the request of the City, the trial court dismissed the plaintiff's action with prejudice. On appeal, the Court of Appeals held that the association's failure to join a necessary party (Eagle) within the applicable time limit for seeking review of the administrative decision warranted dismissal of the action with prejudice.

In doing so, the appellate court held that under CR 19(a) the trial court must determine which parties are "necessary" for a just adjudication; that if a necessary party is absent, the court must determine whether joinder is feasible. CR 19(a); and that if a necessary party cannot be joined, the court must decide whether "in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." CR 19(b).

15. The term or concept of "necessary parties" is not mentioned in WAC 284-02-070, or in Ch. 10.08 WAC, or in Ch. 48.04 RCW which, together with the applicable provisions of Ch. 34.05 RCW (the WA APA), comprise the substantive and procedural requirements for review of action under the Insurance Code by the Insurance Commissioner. The provisions of CR 19(a) and (b) were not adopted by the Insurance Commissioner in promulgating any of those laws. Consistent with that approach, RCW 34.05.010 (12) identifies parties who are or may be parties to agency proceedings, as follows:

"12) "Party to agency proceedings," or "party" in a context so indicating, means:

- (a) A person to whom the agency action is specifically directed; or
- (b) A person named as a party to the agency proceeding or allowed to intervene or participate as a party in the agency proceeding."

16. None of those statutes or regulations include language that imposed a duty on applicant to have joined MetLife as a party to this administrative proceeding. No rule or law informed applicant of any such duty - - or as to *when (if at any time)* such should occur.
17. Nonetheless, the OIC's Motion and Argument at p. 9 relies upon CR 19 and CR 12b)(7)(which were not adopted by the Insurance Commissioner) and at p.10, lines 17 to 19 states: "*However , MetLife cannot now be joined as a party in this matter. Petitioner has failed to seek joinder of MetLife within the statutory period of 90 days.*" At p, 11, lines 4 to 6, the OIC further argues: "*RCW 48.04 provides a statutory time period of ninety (90) days to commence a hearing. MetLife cannot now be joined as ninety(90) days from the date of notification of the rate increase has passed.*" The OIC further argues that because of that non-joinder "*the law requires dismissal of the action with prejudice.*" Id. at p. 10, line 19.
18. The OIC's above reference to RCW 48.04 undoubtedly refers to RCW 48.04.010(3) which in relevant part provides: *(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, . . . \* \* \*, the right to such hearing shall conclusively be deemed to have been waived.*"
19. The OIC's contention that RCW 48.04.010(3) is to be interpreted to require dismissal of the demand for hearing if the applicant does not join a necessary party within 90 days after receiving notice of the written order that aggrieves the applicant is an alteration of the language and intent of that statute.
20. The provisions of RCW 48.04.010(3) are plain and unambiguous. Agrilink Foods, Inc. v. Dep't of Revenue, 153 Wn. 2d 392, 396 (2000) includes these rulings regarding interpretation of unambiguous statutes: "*Statutory interpretation is a question of law that is reviewed de novo. W. Telepage, Inc. v. City of Tacoma Dep't of Fin ., 140 Wn.2d 599 , 607, 998 P.2d 884 (2000). Where statutory language is plain and unambiguous, courts will not construe the statute but will glean the legislative intent from the words of the statute itself, regardless of contrary interpretation by an administrative agency. Bravo v. Dolsen Cos ., 125 Wn.2d 745 , 752, 888 P.2d 147 (1995); Wash. Fed'n of State Employees v. State Pers. Bd ., 54 Wn. App. 305 , 309, 773 P.2d 421 (1989). A statute*

is ambiguous if "susceptible to two or more reasonable interpretations," but "a statute is not ambiguous merely because different interpretations are conceivable." *State v. Hahn* , 83 Wn. App. 825 , 831, 924 P.2d 392 (1996).

*Yousoufian v. Office of King County Executive* 152 Wn.2d 421, 437 (2004): "[When interpreting a statute, our primary duty is to give effect to the legislature's intent. *State v. J.P.* , 149 Wn.2d 444 , 450, 69 P.3d 318 (2003). "If the statute's meaning is plain on its face, then courts must give effect to its plain meaning as an expression of what the Legislature intended." *State v. J.M.* , 144 Wn.2d 472 , 480, 28 P.3d 720 (2001). Furthermore, we will not "add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." *State v. Delgado* , 148 Wn.2d 723 , 727, 63 P.3d 792 (2003).

*Davis v. Department of Licensing*, 137 Wn.2d 957, 964(1999): "The initial principle of statutory construction is we do not construe unambiguous statutes: "In judicial interpretation of statutes, the first rule is 'the court should assume that the legislature means exactly what it says. Plain words do not require construction'." *State v. McCraw*, 127 Wn.2d 281, 288, 898 P.2d 838 (1995) (quoting *City of Snohomish v. Joslin*, 9 Wn. App. 495, 498, 513 P.2d 293 (1973)), superseded by statute as cited in *State v. Bolar*, 129 Wn.2d 361, 917 P.2d 125 (1996)." At Ftn. 1 of the decision, the Davis decision stated: 1 " We do not inquire what the legislature meant; we ask only what the statute means." Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899). "It seems axiomatic that the words of a statute--and not the legislators' intent as such--must be the crucial elements both in the statute's legal force and in its proper interpretation." LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 30 (1985).

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**SUMMARY of Applicant's Response to The OIC's Contentions that Applicant's Demand for Hearing Must be Dismissed Because Applicant Did Not Join MetLife as a Party in these Proceedings**

Applicant respectfully submits that:

- (a) Applicant was not legally required to join MetLife as a party herein;
- (b) The provisions of CR 12 (b)(7) and CR19 are not applicable to this matter;
- (c) The fact that applicant did not join MetLife as a party herein does not require dismissal of applicant's Application and Demand for Hearing;
- (d) The provisions of RCW 48.04.010(3) are plain and unambiguous and, according to their terms. such do not provide for or require dismissal of the Applicant's Application and Demand for hearing because of the fact that the applicant did not join MetLife as a party to these proceedings within 90 days after

applicant receiving notice of OIC's approval of the 22.69% rate increase requests filed by MetLife.

III. Applicant's Response to OIC's Contentions that Applicant is Not "aggrieved" by the OIC's action of Approving the Rate Increase and Does Not Have *Standing* to Challenge that Approval

A. The OIC's Contention that Applicant and Spouse Can Purchase Substitute LTCI Policies and Therefore the Applicant is Not "aggrieved" by OIC's Approval of the Rate Increase is a Fantasy of the OIC; The First Condition for Applicant's Standing under RCW 34.05.530 is Present Here.

1. The OIC engages in fantasy in contending that applicant and spouse may purchase substitute LTCI in lieu of the policies now held by them and, therefore, that applicant is not legally "aggrieved" by OIC's approval of the premium rate increase. Paragraph 5 of *Leo J. Driscoll's May 12, 2016 Declaration* (filed and served herewith), made on personal knowledge of applicant, states:

"I am 89 years old, born 11-14-1926. My health status includes that I have been informed by my physicians that I have Parkinson's Disease (confirmed by a brain scan procedure conducted in 2015), heart valve issues, and an aortic artery-aneurism confirmed by echo-scan procedures in 2015 and again in 2016. My spouse Mary T. Driscoll is 84 years old, born 8-15-1931. She has a very significant problem with breathing that I observe on a daily basis. During the past approximate 5 years her breathing has been supported and maintained by her continuous use of oxygen received from oxygen supply cylinders."

2. Eligibility to purchase LTCI policies No.'s 09852450 and 09852468 was limited by the insurer to persons 84 years old or younger and to persons who were not otherwise disqualified by various identified medical conditions, specifically including Parkinson's and use of oxygen. See "Application For Long-Term Care Insurance" forms, *Applicant's Exhibits 1 and 2*. There exists no reason to believe that applicant and spouse could now qualify for purchase of LTCI from any insurer and the OIC has not provided any proof of its' contentions to the contrary.
3. The last 2 pages of Applicant's Exhibit 7 filed herein consist of a MetLife listing of the 2014 cost of nursing home care in various locations of the nation (see) identifies annual costs of \$117,979 for semi-private nursing home care in the Seattle-Tacoma-Bremerton

areas. The LTCI policies held by applicant and spouse each include a 5% compound annual inflation-protection rider that has increased the "LifeTime Benefit Maximum" from the original 2002 maximum of \$200,750 to more than one million dollars in 2016.

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4. If, hypothetically, substitute LTCI policies were available to persons of the same current age and health status as applicant and his spouse, there is no reason to assume that such policies would provide comparable lifetime benefit coverage of a million dollars for each policy at a cost near that of the LTCI policies now held by them.
5. The OIC's Motion incorrectly describes a LTCI policy as being "a year-to-year contract that is renewable on its yearly renewal date at the option of the policyholder." (Emphasis added). <sup>2</sup> That OIC reference to the incidents of renewability of LTCI and when it occurs materially differ with the corresponding incidents as set forth in the policies issued to applicant and his spouse, <sup>3</sup> which provide:

"This policy is **Guaranteed Renewable**. We cannot cancel or refuse to renew this policy. **You** need only pay the premium on time."

"**We have a limited right to increase premiums**. **Your** premiums will not be increased due to a change in **Your** age or health. We can increase **Your** premiums based on **Your** premium class, but only **We** increase the premiums for all similar policies issued on the same form as this Policy. The premium increases, the increase will be made on an anniversary of the Policy Effective Date. **We** will give **You** at least 30 days written notice before **We** increase **Your** premiums."

6. OIC's contention that applicant is not "aggrieved" because the approved increase as to the LTCI policies held by applicant and spouse has not yet been implemented by MetLife is unavailing to the OIC. The agency action of approving the increase currently is "likely to prejudice" and adversely affect the applicant financially on August 1, 2016 within the meaning of the first condition of *standing* as set forth in

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<sup>1</sup> See Section V, pp. 9-12 of Applicant's Motion and Memorandum for Partial Summary Judgment filed herein.

<sup>2</sup> See OIC's Motion at p.11, lines 15-17.

<sup>3</sup> See face page of each of those policies, Applicant's Exhibits 1 and 2),

RCW 34.05.530. <sup>4</sup> The potential prejudice of that approval to and on applicant and his spouse specifically is concrete, specific, perceptible, and not hypothetical or conjectural. It is "likely" to occur as opposed to merely being speculative. *see, e.g., KS Tacoma Holdings, LLC v. Shorelines Hearings Bd.*, 166 Wn. App. 117, 272 P.3d 876, review denied, 174 Wn.2d 1007 (2012):

¶20 To meet the injury-in-fact test, KS Tacoma must put forth material issues of fact showing that (1) the 2009 revision prejudices or is likely to prejudice it and (2) a decision revoking the 2009 revision would redress such prejudice. RCW 34.05.530; Allan, 140 Wn.2d at 327. The prejudice prong of the injury-in-fact test requires KS Tacoma to allege that it will be "specifically and perceptibly harmed" by the 2009 revision. Trepanier v. City of Everett, 64 Wn. App. 380, 382, 824 P.2d 524 (1992) (quoting SAVE, 89 Wn.2d at 866). When a person or corporation alleges a threatened injury, as opposed to an existing injury, the person or corporation must show an immediate, concrete, and specific injury to themselves. Trepanier, 64 Wn. App. at 383 (citing Roshan v. Smith, 615 F. Supp. 901, 905 (D.D.C. 1985)). "If the injury is merely conjectural or hypothetical, there can be no standing." Trepanier, 64 Wn. App. at 383 (citing United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 688-89, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973)).

7. The words "likely to prejudice that person" in RCW 34.05.570 clearly encompass **potential** prejudice to that person. Professor William E. Andersen's seminal article THE 1988 WASHINGTON ADMINISTRATIVE ACT – AN INTRODUCTION, 64 WLR 781 (1989) (**Andersen** herein) addresses the conditions of standing required by RCW 34.05. 530 beginning at pp. 824 of that article:

"Section 530 imposes three conditions on the availability of judicial review: First, that prejudice or potential prejudice can be shown; second, that the applicant's interests are among those the agency was required to consider; and, third, that the judicial review asked for would substantially eliminate the prejudice shown"

As to the first condition, **Andersen** states that "*a person should be able to meet this condition if he or she can show that the potential injury is real, not that it is substantial. As the United States Supreme Court stated, an "identifiable trifle" should be sufficient*" (Citation and footnote omitted here). Here, applicant shows potential particular injury to applicant

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<sup>4</sup> RCW 34.05.530: "A person has standing to obtain judicial review of agency action if that person is aggrieved or adversely affected by the agency action. A person is aggrieved or adversely affected within the meaning of this section only when all three of the following conditions are present: (1) The agency action has prejudiced or is likely to prejudice that person; (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action."

and his spouse that will commence on August 1, 2016. The OIC's argument that applicant has not met the first condition of RCW 34.05.530 because the rate increase has not been implemented totally ignores the reality that the now potential injury will occur on 8-01-16 unless the administrative tribunal here issues an order that prevents that potential injury.

8. The OIC's contention that RCW 34.05.530's second condition for standing is not present is found at pg.13, line 17 to pg. 14, line 4 of the OIC's Motion and Argument which argue that the interests of applicant and his spouse were not among the interests that the OIC was required to consider when it reviewed and approved the rate increase request of MetLife. Applicant responds to that as follows:

- a. Applicant contends that when the OIC engaged in approving MetLife's submissions in support of the proposed premium-rate increases, that "*agency was required to consider*" the effects of that approval on WA policyholders of any of series LTC.02, LTC.03, and LTC.04 policy form that would be "affected" by such increases, including policyholders such as applicant and his spouse.
- b. Such policyholders are not mere on-lookers, not merely citizens or members of the public who may or may not have concerns with the rates of LTCI policies. Instead such policyholders are and will be directly and concretely impacted by the agency's approval of a legally-insufficient submission made by or on behalf of the insurer of such a policy,
- c. The regulation of insurance, including approval or disapproval of rates for LTCI, in this state is not merely matter between the OIC and the insurer. The Insurance Code is structured to protect consumers of insurance. The requirements of RCW 48.19.020 that "*Premium rate for insurance not be excessive, inadequate, or unfairly discriminatory*" not only regulates insurers but also protects policyholders.
- d. The OIC SERFF State Tracking Files #275017, #275018, and #275019 (Applicant's Exhibits 8, 9, and 10 respectively) filed herein identify the number of Washington policyholders who are affected by the rate increase, as required by the OIC. Such constitutes a recognition by the OIC that the interests of policyholders are to be taken into account in applications to the OIC for review and approval of premium rate increase requests.
- e. OIC's regulatory *concern for policyholders affected by rate increases* is recognized in Applicant's Exhibit 17, an excerpt from "OIC's Motion for Summary Judgment" filed in OIC Hearings Unit Docket 14-0187 identified at paragraph 9 of *Leo J. Driscoll's April 27, 2016 Declaration* filed herein. That excerpt (at pg.7, lines 21 to 25) acknowledges that concern as follows:

"The Office of the Insurance Commissioner is very concerned about long-term care insurance premium rate increases, its affect (sic) on consumers, and future problems for policy holders if there are not enough funds to cover benefits to be provided. As a result, the Office of the Insurance Commissioner ensures that all rate filings with premium rate increases are submitted with evidence supporting the filing. See RCW 48.19.030, RCW 48.19.040, WAC 284-54-630."

f. That the interests of policyholders must be taken into account by the OIC is further reflected in RCW 48.84.030 (1) which directs that *"The commissioner shall adopt rules requiring reasonable benefits in relation to the price charged for long-term care policies and contracts which rules may include but are not limited to the establishment of minimum loss ratios."*

g. The Commissioner has adopted Ch. 284-54 WAC and Ch.284-60 WAC with mirror like provisions that appear to consider the interests of policyholders, there being some uncertainty as to which of those is applicable here but less uncertainty that one or the other applies to premium- rate increases of LTCI of the vintage here in issue.

9. THIRD CONDITION OF STANDING: The OIC's Motion and Argument contends at pg. 14 that applicant cannot pass the last test of standing which requires that a judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by agency action.

a. *KS Tacoma Holdings, LLC v. Shorelines Hearings Bd.*, cited above, holds that:

" ¶21 The redress prong of the injury-in-fact test requires KS Tacoma to put forth material issues of fact showing that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (citing *Lujan*, 504 U.S. at 560-61)."

b. Here, it is indisputable that applicant has presented facts showing that it is likely (as opposed to merely speculative) that the potential injury to applicant and his spouse resulting from the OIC's approval of the 22.69% rate increase will be redressed by a decision favorable to applicant. The question of *when* a favorable decision would be honored is a different issue.

c. The OIC's Motion at pg, 14, line 7-14 is in part based on conclusory assumptions and assertions that do not provide support for a motion summary judgment, to wit: *"The Demand for Hearing, even if successful, would eventually result in the same findings; that MetLife's rate filings were approved because the rates were not excessive, inadequate, or unfairly discriminatory. Furthermore, any order that would reverse these approved rate filings would only drive the product closer to insolvency making it unlikely that policyholders, like Petitioner, could file claims against the policy in the future and would violate WAC 284-83-230(6) which requires that loss-ratios must provide for future reserves and must account for the maintenance of such reserves for future needs."*

d. The provisions of WAC 284-83-230(6) cited above do not appear to be applicable to LTCI policies that were issued prior to January 1, 2009, including the LTCI policies issued to applicant and his spouse. See WAC 284-83-005.

IV. Applicant's Response to the OIC's Contentions that (a) LTCI is "disability insurance" and thus is not subject to the requirements of Ch. 48.19 RCW other than to file a manual of rates and changes thereto; (b) that the OIC Complied with applicable laws in approving the rate increase; (c) that the provisions of RCW 48.19.030 are not mandatory; and, (d) that OIC accepted national loss experience of the product line in approving an earlier rate increase for the product which justifies OIC's action in doing so for this rate increase.

A. Applicant contends that "long-term care insurance, as defined by RCW 48.84.020, is not "disability insurance" or "an insurance appertaining thereto" within the meaning of RCW 48.11.030

1. "Insurance" is defined by RCW 48.01.040: "Insurance is a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies."

2. RCW 48.84.020 defines LTCI : "Long-term care insurance" or "long-term care benefit contract" means any insurance policy or benefit contract primarily advertised, marketed, offered, or designed to provide coverage or services for either **institutional or community-based convalescent, custodial, chronic, or terminally ill care** \* \* \* "

[Bold emphasis added to identify the 'determinable contingencies' insured against by LTCI, i.e., coverage for the specified determinable contingencies which give rise to the need for "care"].

3. RCW 48.11.030 defines "disability insurance" as follows: "Disability insurance" is insurance against **bodily injury, disablement or death by accident, against disablement resulting from sickness, and every insurance appertaining thereto** including stop loss insurance. "Stop loss insurance" is insurance against the risk of economic loss assumed under a self-funded employee disability benefit plan."

[Note: The bold print emphasis and underlining emphasis are added. In bold print are the determinable contingencies insured against; the underlined words enlarge to a limited extent what is otherwise ordinarily meant by 'disability insurance'].

4. Clearly, the determinable contingencies insured against by 'disability insurance', as defined by RCW 48.11.030, do not include any requisite element that the insured incur need for *care* -- *care* of any kind whatsoever. As to disability insurance, as so

defined, the incurrence of *care* is a non-issue. And not every disablement is embraced within the statutory definition of 'disability insurance'. It does not include naturally-occurring disablement, It includes only those disablements caused by accident or sickness.

5. Conversely, the determinable contingencies insured against by LTCI as defined by RCW 48.84.020 do not include any requisite element of *injury, accident, or sickness*. Those are non-issues as to LTCI. Indeed, the need for long-term care often arises from natural aging, enfeeblement, or from other causes which cannot be linked to injury, accident, or sickness. Thus, the determinable contingencies -- the essential, requisite elements -- of disability insurance, as per RCW 48.11.030, and of LTCI, as per RCW 48.84.020, are distinctly-different.
6. The words "and every insurance appertaining thereto" in RCW 48.11.030 modify the meaning of 'disability insurance'. The ordinary, accepted meaning of the word *appertain* is: *to belong to as a part, right, possession* [The Random House Dictionary of the English Language (The Unabridged Edition) Copyright 1966, by Random House).
7. The RCW 48.11.030 definition of 'stop loss' insurance" (i.e., insurance against risk of loss "under a self-funded employee disability benefit plan.") clearly *belongs to, is part of, the 'disability' species of insurance*. LTCI, so differently defined by RCW 48.84.020, does not appropriately or logically belong to the disability species and is not a part of that species. LTCI has a different purpose and market than does disability insurance: LTCI protects the insured policyholder's accumulate *wealth* against the spiraling costs of elder care; disability insurance protects the insured policyholder against his or her loss of *income* resulting from an accident or a sickness.
8. See also the NAIC's "Glossary of Insurance Terms", available on-line at [http://www.naic.org/consumer\\_glossary.htm](http://www.naic.org/consumer_glossary.htm) ( visited May 9, 2016) which provides these general understandings of the two insurances:
  - **Disability Income - Short-Term** - policies that provide a weekly or monthly income benefit for up to five years for individual coverage and up to one year for group coverage for full or partial disability arising from accident and/or sickness.
  - **Disability Income - Long-Term** - policies that provide a weekly or monthly income benefit for more than five years for individual coverage and more than one year for group coverage for full or partial disability arising from accident and/or sickness.

- **Long-Term Care** - policies that provide coverage for not less than one year for diagnostic, preventive, therapeutic, rehabilitative, maintenance, or personal care services provided in a setting other than an acute care unit of a hospital, including policies that provide benefits for cognitive impairment or loss of functional capacity. This includes policies providing only nursing home care, home health care, community based care, or any combination. The policy does not include coverage provided under comprehensive/major medical policies, Medicare Advantage, or for accelerated health benefit-type products.

9. Applicant submits that “long-term care insurance” as defined by RCW 48.84.020 is not “disability insurance” or “an insurance appertaining thereto” within the meaning of RCW 48.11.030, and is not exempt or excepted from any of the provisions of Ch. 48.19 RCW.

B. The OIC has acknowledged that rate increase filings for the series LTC.02, LTC.03, and LTC.04 policy forms are subject to the provisions of **RCW 48.19.030** and **RCW 48.19.040** notwithstanding the OIC’s’ current contention to the contrary.

10. Applicant’s Exhibit 17 that has been served and filed in these proceedings<sup>5</sup> includes this admission by the OIC that long-term insurance premium rate filings are to be submitted with evidence supporting the filing as required by RCW 48.19.030, RCW 48.19.040, and WAC 284-54-630:

“The Office of the Insurance Commissioner is very concerned about long-term care insurance premium rate increases, its affect (sic) on consumers and the future problems for policyholders if there are not enough funds to cover benefits to be provided. As a result, the Office of the Insurance Commissioner ensures that all rate filings with premium rate increases are submitted with evidence supporting the filing. See RCW 48.19.030, RCW 48.19.040, WAC 284-54-630. All these materials are reviewed by OIC Staff actuaries. OIC actuaries can request further information if needed to evaluate the rate filing. *Id.*”<sup>6</sup>

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<sup>5</sup> Applicant’s Exhibit 17 is identified and authenticated in paragraph 9 of *Leo J, Driscoll’s April 27, 2016 Declaration* served and filed in these proceedings.

<sup>6</sup> Pg. 6, lines 20 to pg. 7, line 1 of the OIC Staff’s Motion for Summary Judgment in OIC Hearings Unit Docket No. 14-0187.

- V. Response to the OIC's Contentions that the provisions of RCW 48.19.030 are not mandatory for the insurer.

The OIC argues at pp. 20-21 of the OIC's Motion that the provisions of RCW 48.19.030 are not mandatory and are only instructional for the insurer. In doing so, the OIC would have us ignore words of the statute which makes it mandatory. RCW 48.19.030 provides that

"Rates **shall be used**, subject to the other provisions of this chapter, **only if made in accordance with the following provisions:** . . . \* \* \* (3) Due consideration in making rates for all insurances **shall be given** to (a) Past and prospective loss experience within this state for experience periods acceptable to the commissioner: If the information is not available or is not statistically credible, an insurer may use loss experience in those states which are likely to produce loss experience similar to that in this state." (emphasis added).

The use of the words "Rates **shall be used** . . . \* \* \* **only if made in accordance with the following provisions:**" clearly reflect a mandatory (not permissive) intent. Likewise does the use of the words "shall be given" in the first phrase of subsection (3) of the statute.

- VI. Consideration of OIC Actuary Scott Fitzpatrick's April 23, 2016 Declaration and of OIC's Exhibit 3 filed in support of the OIC's Dispositive Motions

1. Mr. Fitzpatrick's April 23, 2016 Declaration, at para,13, pg.3, lines 19 to 23, here quoted verbatim, states that:

"I also reviewed the email communications between OIC 's Actuaries regarding The 2011 MetLife rate filings, and in particular, the discussions that approved MetLife's submission of national experience due to the small number of claims sold in Washington and nationally. A true and correct copy of those emails are (sic) attached hereto as OIC's Exhibit 3: Prior Approval of National Experience."<sup>7</sup>

2. The OIC's Exhibit 3 consists solely of email communications between OIC personnel during the period of June 13, 2011 to August 17, 2011.
3. Contrary to what Mr. Fitzpatrick states in the quoted excerpt above, examination of the Exhibit 3 email communications will not disclose any "discussions that approved MetLife's submission of national experience **due to the small number of claims**" of policies "**sold in Washington**

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<sup>7</sup> The phrase "due to the small number of claims sold in Washington and nationally." In the first sentence of the quote appears to be in error and, given the context of the entirety of paragraph 13, the phrase clearly was intended to read: "due to the small number of claims **of policies** sold in Washington and nationally".

**and nationally**". Not even one of those emails refers to or discusses the number of claims of policies that were sold in Washington and nationally.

4. Applicant requests that the OIC's Reply to Applicant's Response to OIC's Dispositive Motions identify with particularity an OIC Exhibit 3 email which includes any discussions that approved MetLife's submission of national experience *due to the small number of claims of policies sold in Washington and nationally*. The OIC will be unable to do that because the OIC's Exhibit 3 emails do not include any such discussions,
  5. The first reference here of record to *the small number of claims of policies sold in Washington and nationally* was not made in the OIC's Exhibit 3 emails between OIC personnel in 2011. That reference was made by Mr. Fitzpatrick himself in 2015 in the "Second Declaration of Scott Fitzgerald", dated January 16, 2015, served upon Leo J. Driscoll January 20, 2015 and filed January 20, 2015 in OIC Hearings Docket No. 14-0187 (See paragraph 6 of *Leo J. Driscoll's May 12, 2016 Declaration* filed herein).
  6. Mr. Fitzpatrick's reference to *the small number of claims of policies sold in Washington and nationally* was made by him in the context of espousing OIC reliance on the "Bayesian Credibility Theory" as the basis of OIC's approval of the 2011 rate increase, as to which, para. 19 of Mr. Fitzpatrick's January 16, 2015 Declaration explained:

*"The Bayesian Credibility Theory requires that at least 1,082 claims be currently filed on a policy form within a state to attain statistical credibility for a rate filing and loss ratio analysis."*
  7. The information provided by MetLife to the OIC in support of the rate increase did not disclose the number of claims of the subject policy forms; instead, the information provided by MetLife to the OIC identified the dollar amount of "Incurred Claims" of such policy forms. Such appears in Exhibits I, II, and III attached to the Actuarial Memorandum filed in the OIC SERFF filings #275017 (pp.56-59), #275018 (pp.57-60), and #276019 (pp. 58-61) (Applicant's Exhibits 8, 9, and 10 respectively).
  8. The record does not show that the number of claims of the subject policy forms nationwide has been disclosed of record by MetLife to the OIC. It necessarily follows that the lack of that information precludes use of or reliance on the Bayesian Credibility Theory in lieu of using "loss experience in those states likely to produce loss experience similar to that in this state", as permitted by RCW 48.19.030(3)(a).
- VII. The OIC's Dispositive Motion is not supported by information showing that "Due consideration" was given by the insurer to "Past and prospective loss experience on policies within this state" coupled with "loss experience in those

states likely to produce loss experience similar to that in this state, or that such experience is not statistically credible” as provided in RCW 48.19.030(3).

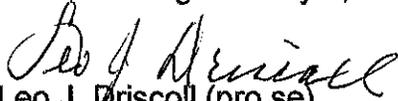
1. The OIC’s Dispositive Motion makes no showing that the information provided to the OIC by MetLife in the OIC SERFF filings #275017, #275018, and #276019 (Applicant’s Exhibits 8, 9, and 10 respectively) included information showing that due consideration had been given by MetLife to the provisions of RCW 48.19.030(3)(a).
2. The OIC’s Dispositive Motion makes no showing that in OIC’s review of MetLife’s request for a 22.69% increase in the rates of the series LTC,02, LTC.03, and LTC.04 LTCI policy forms, the OIC made reasonable inquiry as to the loss experience of those forms in those states of the United States which are likely to produce loss experience similar to that in this state.
3. The OIC contends in substance and effect at pp.20-23 of the OIC’s Dispositive Motion that it was necessary and lawful for the OIC to accept and rely upon the national loss experience of the combined LTC,02, LTC.03, and LTC.04 LTCI policy forms without reasonable inquiry by MetLife (and/or by the OIC) as to the loss experience of those forms in those states of the United States which are likely to produce loss experience similar to that in this state. Those contentions are not in keeping with the mandatory requirements of RCW 48.19.030 and do not provide factual or legal basis for granting the OIC’s Dispositive Motion.
4. The provisions of RCW 48;19.030(3)(a) are unambiguous. Under RCW 48.19.030(3)(a), in circumstances where it is determined that loss experience within the state of Washington alone is not available or is not statistically credible, the provisions of RCW 48.19.030(3)(a) do not permit the insurer to use **nationwide** loss experience in lieu of using *“loss experience in those states which are likely to produce loss experience similar to that in this state.”*
5. That limitation on the permission granted to the insurer by RCW 48;19.030(3)(a) was a policy choice made by the legislature. “ It is not the province of the judiciary to concern itself with questions of legislative policy where the provisions of the statute leave no room for construction.” *Hardy v. Herriott*, 11 Wash. 460 (1895). Applicant respectfully submits that, likewise, it is not the province of this tribunal acting in a quasi-judicial capacity to question the policy choice made by the legislature in addressing the extent of permission given to an insurer by RCW 48.19.030(3)(a) .

**VIII.** The “filed rate doctrine” does not bar applicant’s Demand for an adjudicative hearing to address the validity of the rate increase requested by MetLife and approved by the OIC.

1. At pp. 24-25 of the OIC's Motion, the OIC cites the Court of Appeals decision *McCarthy Finance, Inc. v. Premera*, 182 Wn. App. 1 (2014) which cited *Tenore v. AT&T Wireless Services*, 136 Wn.2d 322, 331 (1998) which held that the 'filed rate doctrine' "*provides, in essence, that any 'filed rate'—a rate filed with and approved by the governing regulatory agency—is per se reasonable and cannot be the subject of legal action against the private entity that filed it.*"<sup>8</sup>
2. Here, applicant has not initiated a *legal action against the private entity that filed the rate increase request*; rather, applicant has filed an Application and Demand for an adjudicative hearing before the Hearings Unit of the OIC to correct OIC's erroneous approval of the rate increase request.
3. *Tenore v. AT &T Wireless Services*, 136 Wn. 2d at 335 identified the ". . . purposes behind the "filed rate doctrine - preserving an agency's primary jurisdiction to determine the reasonableness of rates and insuring that only those rates approved are charged-" Here the Application and Demand for the administrative hearing preserve the OIC's primary jurisdiction to determine the reasonableness of rates and ensure that only those rates that are lawfully and properly approved are charged.
4. In effect, the OIC is now contending that a rate increase request filed with and erroneously approved by the OIC is impervious to correction within the agency itself through the procedures set forth in WAC 284-02-070(2), chapter 48.04 RCW, chapter 34.05 RCW, and chapter 10.08 WAC. It is tantamount to contending that a policyholder who is aggrieved by an erroneous approval of a rate increase request has no right to be meaningfully and timely heard within and by the agency to correct that error.
5. Applicant respectfully requests that the OIC reconsider the matter.

CONCLUSION: The Presiding Officer should enter an order that determines that a motion to dismiss under CR 12(b)(6) and CR 19 is inapplicable here and that the OIC's alternative Motion for Summary Judgment is denied.

Dated and signed May 2, 2016.

  
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<sup>8</sup> The Supreme Court's decision *McCarthy Finance v. Premera*, 182 Wn.2d 936 (2015) reversed the Appellate Court on other grounds