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HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER

STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of

LEO J. DRISCOLL,

Petitioner.

Docket No. 16-0002

OIC'S REPLY IN MOTION TO
DISMISS, OR IN THE
ALTERNATIVE, SUMMARY
JUDGMENT

I. MOTION AND RELIEF REQUESTED

Office of the Insurance Commissioner's ("OIC") staff submits this Reply In OIC's Motion To Dismiss, Or In The Alternative, Summary Judgment and requests entry of an order dismissing Petitioner's Demand for Hearing as a matter of law.

II. BACKGROUND

On August 14, 2014, MetLife submitted three rate filings to the Office of the Insurance Commissioner that sought to increase premium rates to ensure coverage of all future claims for three long-term care policies based upon the anticipated loss ratios for these policies. See OIC Exhibit 1 Attached to Declaration of Scott Fitzpatrick: MetLife 2014 SERFF Filings. MetLife submitted all of the actuarial data and information required by the Insurance Code to support the 2014 rate filings including over three hundred (300) pages and an extensive Actuarial Memorandum calculating the anticipated loss ratio of this long-term care insurance product.

The Office of the Insurance Commissioner's long-term care actuary, Scott Fitzpatrick, specializing in and experienced with long-term care insurance rate filings, reviewed MetLife's 2014 rate filings and supporting materials. These rate filings and

1 supporting materials were no different in form or substance than any other typical rate
2 filing. In fact, the rate filing was identical to MetLife's 2011 rate filing, which also
3 included national experience. MetLife could not submit Washington specific experience
4 because that experience would not have been credible by actuarial and insurance
5 industry standards. *Id.* Actuarial and insurance industry standards require that for loss
6 ratios to be statistically credible there must be at least 1,082 active claims (claims being
7 processed at the time of the filing) in the block of insurance. *Id.* All three of MetLife's
8 policies combined in the state of Washington only total eight hundred and seventy-three
9 (873) policies, of which only a small percentage would have been currently in active
10 claim status at the time of filing. *See Id* and OIC Exhibit 1: MetLife 2014 SERFF
11 Filings.

12 MetLife had already received approval to submit this national experience during
13 its 2011 rate filing which was approved with the submission of national experience. *See*
14 OIC Exhibit 2, p, 211 and similar pages. Even in 2011, the Insurance Commissioner
15 accepted MetLife's national experience because it was the only experience that was
16 creditable. Petitioner even appealed the 2011 rate filing approval, but did not dispute the
17 submission of national experience at that time when national experience was first
18 accepted by the Insurance Commissioner.

19 MetLife's 2014 rate filings provided detailed actuarial information that showed
20 that MetLife had already paid out claims that amounted to 54.4% of collected premiums
21 for this product line. *See* OIC Exhibit 1: MetLife 2014 SERFF Filings. If the OIC did
22 not approve MetLife's rate filing, actuarial calculations directed that the policies would
23 be operating at a 170.7% loss ratio, making the policies virtually insolvent in the future
24 and likely that future claims, including any future claims of Petitioner, would not be
25 covered. *Id.* The OIC has concerns that even with this change in premiums, the
26 products will still be operating at a projected 98.4% loss ratio, keeping the product still
dangerously close to insolvency. *Id.* However, OIC concerns regarding the effect of
premium changes on policyholders outweighed the potential concerns regarding loss
ratio.

1 The OIC spent a significant amount of time and diligence in reviewing MetLife's
2 August 14, 2014 rate filings and the actuarial information contained in these rate filings.
3 MetLife's rate filings were not approved until July 10, 2015. *Id.* That same day, the
4 Dispositions were posted in SERFF and MetLife was notified that the Insurance
5 Commissioner approved the rate filings. *Id.*

6 As required by law, MetLife could not automatically implement the premium
7 rate increase. The premium rate increase could only be implemented at the next renewal
8 term of each individual's long-term care insurance contract. This protects consumers by
9 ensuring that their contract does not change during their contract term.

10 Long-term care insurance consumers have additional protections in Washington.
11 The Legislature and OIC recognized the special nature of long-term care insurance and
12 developed regulations to protect consumers who choose not to renew a long-term care
13 insurance contract due to a premium rate increase. These consumers are not forced to
14 choose between paying the new premium rate or not renewing coverage, rather long-
15 term care insurance carriers are required to provide nonforfeiture options to Washington
16 consumers as an alternative to renewal or non-renewal. In accordance with these
17 provisions, at least sixty (60) days prior to a premium increase at renewal of a policy,
18 MetLife advised policyholders that they could lessen or avoid the impact of the new
19 premium rate by choosing an alternative option such as reducing coverage on the policy
20 or not renewing the contract while retaining a level of benefits commensurate with the
21 premiums paid.

22 After receiving this notice, Petitioner filed a Demand for Hearing disputing the
23 approval of these rate filings on January 4, 2016. While Petitioner seeks to have
24 MetLife's rate filings disapproved, he has not included MetLife, a necessary party, in
25 this action nor has he demonstrated that he was aggrieved by the acceptance of national
26 rates in MetLife's rate filing.

III. ARGUMENT AND AUTHORITY

1. Petitioner's Demand For Hearing Should Be Dismissed For Failing To Join An Indispensable Party

1
2 The Presiding Officer of the Office of the Insurance Commissioner has the
3 power to rule on all procedural matters, including determining if all the appropriate
4 parties have been joined by the Petitioner. WAC 284-02-070(1)(d)(i), RCW 34.05.449,
5 and WAC 10-08-200(4). Under the APA, the Insurance Code and the Model Rules of
6 Procedure, a Hearings Officer is vested with the authority to determine all procedural
7 matters and motions. WAC 10-08-200(4) states that the Presiding Officer shall have
8 authority to rule on procedural matters, objections, and motions. Similarly, RCW
9 34.05.449 provides that the presiding officer shall regulate the course of the
10 proceedings, in conformity with applicable rules and the prehearing order, if any. The
11 Insurance Code provides similar authority to the Insurance Commissioner's Presiding
12 Officer. WAC 284-02-070(1)(d)(i) states:

13 The Insurance Commissioner may delegate the authority to
14 hear and determine the matter and enter the final order under RCW
15 48.02.100 and 34.05.461 to a chief presiding officer. The
16 commissioner may appoint a chief presiding officer who will have
17 primary responsibility for the conduct of hearings, the procedural
18 matters preliminary thereto, and the preservation of hearing records.

19 Despite Petitioner's assertions to the contrary, it is clear that the Presiding
20 Officer has the authority to rule on any motions, including procedural motions, such as
21 the procedural rule 19, which ensures that a person demanding a hearing has included
22 all necessary parties to prevent prejudice or injury to a party. Furthermore, RCW
23 34.05.510 provides for judicial review of agency determinations including joinder.
24 Specifically, this statute provides that ancillary procedural matters before the
25 reviewing court, including intervention, class actions, consolidation, joinder,
26 severance, transfer, protective orders, and other relief from disclosure of privileged or
confidential material, are governed, to the extent not inconsistent with this chapter, by
court rule and that this review is de novo or jury trial review depending upon the
provision. A trial court could not conduct a review of a ruling on joinder under Civil
Rule 19, if the Presiding Officer could not make that initial ruling. This statute would
be superfluous if that were true. Instead, this statute clarifies that the Presiding Officer

1 has the authority to issue decisions on joinder, and like the courts, is to apply the Civil
2 Rules of Procedure.

3 In this matter, Petitioner seeks to overturn the Insurance Commissioner's
4 approval of MetLife's rate filings on the basis that MetLife provided national
5 experience and actuarial information to the OIC. *See* Demand for Hearing, pg. 5 and
6 Declaration of Mary T. Driscoll (attached to Demand for Hearing). Petitioner alleges
7 that MetLife did this intentionally for the purpose of "normalizing rates." *Id.* Petitioner
8 also seeks to litigate issues relating to the policy contract between the Petitioner and
9 MetLife, among other assertions. *See* Demand for Hearing, pg. 8, Section K. Petitioner
10 also cited and quoted numerous pages of his contract in his Partial Motions for
11 Summary Judgment. However, the Petitioner has not joined MetLife in this proceeding
12 and Petitioner even declined joining MetLife at the Prehearing Conference.

13 The OIC cannot provide evidence to dispute these assertions in the place of
14 MetLife because the OIC does not have this information. The OIC has no information
15 relating to the contract between Petitioner and MetLife other than that provided by
16 Petitioner. By Petitioner's actions to decline joining MetLife in this matter, MetLife
17 has been prevented from protecting its interest in its own rate filings and its interest in
18 the approved premium rates. Furthermore, MetLife has been prevented from defending
19 itself from these accusations. Therefore, MetLife is an indispensable party and this
20 matter must be dismissed for Petitioner's failure to join an indispensable party.

21 Petitioner appears to argue that it is the OIC's responsibility to join MetLife or
22 object to the preclusion of MetLife in the proceedings. However, neither of these are
23 the OIC's responsibility. Nor has Petitioner cited to any statutes, regulation or rule
24 supporting his contention. Rather, joinder of parties is the responsibility of the person
25 initiating the action.

26 On May 2nd, in response to OIC's Motion to Dismiss, Petitioner notified
MetLife of this action for the first time by mail, however that notification went to an
address that was provided to Petitioner in his notice regarding the rate increase. This
notice was also not sent by service of process means as required in statute and that
used by Petitioner in his prior Demand for Hearing. In Petitioner's Demand for

1 Hearing regarding MetLife's 2011 rate filings, Petitioner immediately served MetLife
2 by the Insurance Commissioner's service of process as provided for in RCW
3 48.02.200 and RCW 48.05.200. A copy of that service of process is attached hereto as
4 OIC's Exhibit 7 attached hereto: Service of Process on MetLife. However, in this
5 matter, Petitioner only notified MetLife after the OIC filed its Motion to Dismiss, Or
6 In the Alternative, Summary Judgment, which among other grounds, moved to dismiss
7 Petitioner's Demand for Hearing for failing to include MetLife, who is a necessary
8 party in this action. Furthermore, despite having used the required service of process
9 in his prior matter, Petitioner did not use the service of process as required by RCW
10 48.05.200 and RCW 48.02.200, but rather merely sent copies of the motions by US
11 Mail to an address that doesn't even appear to on correspondence between MetLife
12 and Petitioner, including the latest notification of the premium rate increase. *Id.*
13 MetLife's domiciliary address is in Connecticut (as it appears in correspondence with
14 Petitioner),¹ MetLife's service of process address for the state of Washington is in
15 Olympia, WA. Petitioner's actions are not service of process nor is it joining MetLife
16 in the action, instead it seeks to shift the burden to MetLife to take part in the action,
17 Nor was this done so appropriately in accordance with the correct address or with the
18 service of process statutes that Petitioner is aware of and followed in the last matter.
19 Petitioner has not merely neglected to include MetLife, but is specifically taking
20 actions and determined steps to exclude MetLife from participating or intervening in
21 this matter.

22 While Petitioner claims that due process entitles him to a hearing on MetLife's
23 rate filings, Petitioner has intentionally sought to deny MetLife due process. CR 19 is
24 not only applicable to court hearings, CR 19 concerns parties who must be joined for a
25 just adjudication. *Crosby v. Spokane County*, 137 Wn. 2d 296, 302 (1999); 1999
26 Wash. LEXIS 72. Although a Civil Rule 19 is a procedural rule, it is also a rule based
upon equity, ensuring that all parties in the matter are given due process rights and that
a judgment is not entered without their presence that may impact their interests.

¹ See Petitioner's Exhibit 5 attached to Partial Motions for Summary Judgment.

1 Petitioner has not only declined to include MetLife but has knowingly taken steps to
2 exclude MetLife from this matter. Further, CR 19 is applicable to administrative
3 hearings as noted in *Crosby v. Spokane County* which specifically changed the
4 language of CR 19 to a “just adjudication” to encompass administrative hearings.
5 Washington case law allows dismissal for failure to join a party under Washington’s
6 Civil Rule 19 in administrative hearings.

7 In this matter, MetLife is a necessary party because they have an interest
8 relating to the subject of the action and in the disposition of this action. MetLife must
9 be afforded the opportunity to protect its rights in its rate filings and economic
10 interests, especially since the issue in controversy is MetLife’s own rate filings and
11 especially because MetLife’s rate filings are likely already in effect for some
12 policyholders. Additionally, overturning the approved rate filings presents serious
13 financial consequences to MetLife. MetLife’s absence from this matter will impair or
14 impede MetLife’s ability to protect its interest in its own rate filings, earnings, and
15 MetLife may face potential insolvency of these policies if a rate increase is not
16 implemented. Further, because Petitioner’s Demand for Hearing requests that
17 approval of MetLife’s rate filings be overturned, no judicial order could reduce or
18 lessen the prejudice to MetLife if its rates were now disapproved. MetLife’s absence
19 also prejudices the Office of the Insurance Commissioner because of Petitioner’s
20 numerous factual assertions which it does not have the information to address.

21 In equity and good conscience, the action should be dismissed because the
22 absent party is indispensable. RCW 48.04 provides a statutory time period of ninety
23 (90) days to commence a hearing. Petitioner has failed to seek joinder of MetLife
24 within the statutory period of ninety (90) days. Petitioner did not even notify MetLife
25 of the action within ninety (90) days.² Where a proceeding has not been commenced
26 against all of the indispensable parties within the statutory time, it must be dismissed.

² It is also unlikely that MetLife would have even received Petitioner’s notice given that the address where Petitioner sent notice was not to an address as provided for to correspond with nor is it an address listed of Petitioner’s notice regarding the premium rate increase. See Petitioner’s Exhibit 5.

1 Crosby v. Spokane County, p. 305. As a result, the law requires dismissal of this
2 action with prejudice. See Nat'l Homeowners Ass'n v. City of Seattle, 82 Wn. App.
3 640, 919 P.2d 615, 1996 Wash. App. LEXIS 226 (Wash. Ct. App. 1996). MetLife
4 cannot now be joined because the statutory time limit of ninety (90) days has passed.
5 Therefore, the Demand for Hearing must be dismissed as a matter of law because
6 MetLife is an indispensable party in this matter that concerns MetLife's rate filings
7 and cannot now be joined due to Petitioner's decision to decline timely joining
8 MetLife.

9 2. Petitioner Does Not Have Standing To Demand A Hearing, Therefore This
10 Matter Must Be Dismissed

11 Petitioner is not aggrieved by MetLife's submission of national experience and
12 the Insurance Commissioner's acceptance of national experience because his new rate
13 has not yet been implemented. Petitioner also does not have standing because he
14 remains free to contract, to choose whether or not to renew or to choose among his
15 alternative options. Long-term care insurance is a year-to-year contract that is
16 renewed on its yearly renewal date at the option of the policyholder. A policyholder
17 has a guarantee against increase during the annual term of the policy and a guarantee
18 that it will be renewed by the insurer at the option of the policyholder, but not a
19 guarantee against an increase for the next term.

20 Currently, Petitioner is pre-contract with an option to renew the contract, but
21 he has not accepted the rate of the new term. Petitioner remains free to contract, such
22 as choose a new carrier, choose to pay for the new term, or choose not to accept the
23 new rate. Long-term care policyholders, like Petitioner, have specific protections
24 under the Insurance Code to ensure that consumers have more options in order to
25 retain some benefits from their prior contract terms. Policyholders can also choose to
26 lessen or avoid the impact of the new premium rate by choosing an alternative option
such as reducing coverage on the policy or not renewing the contract while retaining a
level of benefits commensurate with the premiums paid. Therefore, Petitioner does
not have standing to challenge the rate because the rate filings do not impact his

1 present term of policy and because the Petitioner remains free to contract and to
2 choose among options presented.³

3 A party may move to dismiss a complaint for lack of standing, and a party
4 must be aggrieved to have standing in an administrative hearing. The Insurance Code
5 provides that anyone “aggrieved” by an action of the Commissioner has the right to
6 request a hearing from the Commissioner within ninety (90) days. RCW 48.04.010
7 and WAC 284-02-070. A person “has standing to obtain judicial review of agency
8 action if that person is aggrieved or adversely affected by the agency action.” RCW
9 34.05.530. A person is so aggrieved or adversely affected when: (1) The agency action
10 has prejudiced or is likely to prejudice that person; (2) That person's asserted interests
11 are among those that the agency was required to consider when it engaged in the
12 agency action challenged; and (3) A judgment in favor of that person would
13 substantially eliminate or redress the prejudice to that person caused or likely to be
14 caused by the agency action. These three conditions are derived from federal case law
15 and all three conditions must be met to confer standing. *St. Joseph Hosp. & Health
16 Care Ctr. v. Department of Health*, 125 Wn.2d 733, 739, 887 P.2d 891 (1995).
17 Petitioner has not met these conditions.

18 Petitioner asserts that he has standing because he has been impacted by the rate
19 filing; however this does not prove that he is aggrieved by the OIC’s actions in
20 accepting national experience. Petitioner’s claim is that the OIC erred in accepting
21 national experience versus Washington state experience. Petitioner has not
22 demonstrated how he has been aggrieved by that action, rather merely alleges that his
23 rates have increased.⁴ This is not standing under Petitioner’s claim, if standing could
24 be premised on this overly-broad claim, any person would have a right to standing and
25 be able to demand a hearing on any rate filing.
26

23 ³ Petitioner asserts that he may not be able to purchase new long-term care
24 insurance, because his particular policy is not sold to his age bracket, however he has not
25 submitted any proof that he shopped around or that this is a standard exclusion.

26 ⁴ Petitioner also asserts that it is the OIC’s burden to provide proof with regards
to his standing claims, however the person challenging an agency action has the burden
of proof to demonstrate that the agency’s actions were invalid.

1 In support of his contention that he has standing Petitioner cites to his contract,
2 demonstrating once again that MetLife is a necessary party to this action. Petitioner
3 cites the guaranteed renewability clause to dispute the fact that a long-term care
4 insurance contract is not a year-to-year contract. However, as the OIC has stated long-
5 term care insurance is a year-to-year contract renewable at the option of the purchaser.
6 Long-term care insurance contracts are guaranteed renewable, which simply means
7 that the insurer cannot cancel the contract at the next term, however a consumer can
8 cancel at any time, including before the next term.

9 Petitioner has not demonstrated that he has been harmed by the injury claimed
10 by the Petitioner – that the OIC violated the law in accepting MetLife’s submission of
11 national experience. Instead, Petitioner makes general claims regarding a premium
12 rate increase, but does not demonstrate how this premium rate increase would have
13 been any more or less based upon national experience versus Washington State
14 experience. In fact, as the cost of health care is a significant portion of the information
15 considered in determining experience and with the much higher cost of health care in
16 Washington than the national average, it is highly likely that Petitioner actually
17 benefitted from MetLife’s use of national experience.

18 The test for standing is a three-part test. The first and third conditions are often
19 called the injury-in-fact requirements, and the second condition is known as the “zone
20 of interest” test. *Id.* The first test determines whether a party is within the zone of
21 interest to confer standing and requires that the agency has caused or will cause harm
22 to the petitioner. Generally, in administrative adjudications, a person has standing
23 when the agency takes some form of action involving that person. *Seattle Bldg. &*
24 *Constr. Trades Council*, 129 Wash.2d 787, 794, 920 P.2d 581 (1996) citing RCW
25 34.05.001.

26 In this instance, MetLife submitted its rate filings. The persons whose rights
would be determined by the order approving or denying the rate filing would be
MetLife. Furthermore, RCW 34.05.010 which discusses the right to adjudicative
review limits standing regarding rate filings to the applicants (MetLife) who submitted

1 the rate filing, and only in the case of a denial, or modification of the filed rate. See
2 RCW 34.05.010(1).

3 Simply because a rate filing may impact policyholders who choose to renew
4 their policy for another term does not confer standing to those policyholders. Rather,
5 Petitioner must have a substantial interest in the agency action. *Seattle Bldg. &*
6 *Constr. Trades Council* at 794. However, policyholders are not required to obtain
7 long-term care insurance nor are they required to pay the changed rate, rather
8 policyholders remain free to contract. In this instance, the rate has not yet been
9 implemented or accepted and the policyholders are even offered a number of options
10 to avoid the impact of the premium rate increase. Furthermore, Petitioner has not
11 demonstrated how he has been injured by MetLife's submission of national
12 experience, rather he has only alleged that he has been subject to a rate increase.
13 Petitioner has not demonstrated that this rate increase was inaccurate or that the rate
14 increase would have been different if Washington experience could have been
15 creditable. Therefore, the Petitioner does not have a substantial property interest
16 sufficient to acquire standing.

17 The second test limits review to those for whom it is most appropriate. *Id.*
18 The test focuses on whether the Legislature intended the agency to protect the party's
19 interest when taking the action at issue. *Id.* "The Washington Insurance Code governs
20 the regulation of insurance and does not itself provide protection or remedies for
21 individual interests." *Pain Diagnostics and Rehabilitation Associates, P.S. v.*
22 *Brockman*, 97 Wn. App. 691, 697, 988 P.2d 972 (1999). The Insurance Code is not
23 intended to create a property interest in a consumer that is equivalent to a
24 constitutionally protected interest. Instead, protection for individual interests and
25 remedies for violations of the insurance statutes and regulations must be brought under
26 Washington's Consumer Protection Act (CPA). The remedy for Petitioner is to file a
challenge under the CPA if the Petitioner believes that MetLife is violating its contract
terms or is seeking to "normalize" rates in violation of the law or Petitioner's contract
rights. Petitioner cannot be aggrieved by the OIC's approval of MetLife's rate filings
because the intent of the Legislature when creating the Insurance Code was to regulate

1 insurance, not create private rights of enforcement as the Legislature provided for in
2 the CPA.

3 Petitioner asserts that the Insurance Commissioner was required to consider
4 him in reviewing the rate filings and cites to MetLife's rate filings which include
5 information on the number of Washington policyholders, however this information is
6 provided by MetLife not the OIC. Petitioner also states that because the Insurance
7 Commissioner is concerned about long-term care rate increases that this is equivalent
8 to an interest that the agency is *required* to consider when accepting experience to
9 ensure that the experience is creditable. Rather, the OIC is directed to regulate the
10 industry and while it does protect the interests of consumers, the OIC is not required to
11 consider the interests of consumer in RCW 48.19.030 and RCW 48.19.040. These
12 statutes do not mandate that the Insurance Commissioner is required to consider the
13 Petitioner's interests.

14 Finally, Petitioner also cannot pass the last test which requires that a judgment
15 in favor of that person would substantially eliminate or redress the prejudice to that
16 person caused or likely to be caused by agency action. The Demand for Hearing, even
17 if successful, would eventually result in the same findings; that MetLife's rate filings
18 would be approved. Furthermore, any order that would reverse these approved rate
19 filings would only drive the product closer to insolvency making it unlikely that
20 policyholders, like Petitioner, could file claims against the policy in the future.
21 Petitioner's Demand for Hearing states that MetLife did not submit Washington
22 specific experience, however Petitioner has not alleged how Washington specific
23 experience would have resulted in any other premium rate. If MetLife had submitted
24 Washington specific experience (which it cannot do because it is not creditable) there
25 would be no difference in premium rate, in fact, it is likely that the premium rate
26 would increase. Petitioner's alleged injury-in-fact is merely speculative and would not
be redressed by a favorable decision.⁵

⁵ Furthermore, a favorable decision holding that RCW 48.19.030 and RCW
48.19.040 were applicable would automatically qualify Petitioner's policy as a file and
use policy, and the rates would have been implemented in 2014.

1 Petitioner cannot pass these three standing requirements and does not have
2 standing to demand a hearing under the Insurance Code. The Office of the Insurance
3 Commissioner, as an administrative agency, only has those powers either expressly
4 granted or necessarily implied by the Legislature. The Legislature has expressly
5 granted the Office of the Insurance Commissioner jurisdiction to hear appeals only
6 from aggrieved persons pursuant to RCW 48.04.010. Petitioner is not aggrieved by an
7 action of the Commissioner because his new rate has not yet been implemented,
8 Petitioner has not yet accepted this rate increase, and because he remains free to
9 contract with another carrier or choose among his other options. Therefore, Petitioner
10 does not meet the standing requirements for an aggrieved person and the Demand for
11 Hearing must be dismissed as a matter of law.⁶

12 3. Petitioner Has Failed To State A Claim Upon Which Relief Can Be Granted,
13 Therefore The Demand For Hearing Must Be Dismissed

14 Long-term care insurance is a type of disability insurance and disability
15 insurance is exempt from the provisions of Chapter 48.19 RCW. Petitioner mistakenly
16 asserts that the definition of disability insurance excludes long-term care insurance on
17 the basis that aging is not a sickness. However, Petitioner misunderstands the nature
18 of long-term care insurance and disability insurance. Long-term care insurance is
19 classified as disability insurance in the Insurance Code and long-term care insurance is
20 not limited to use only by elderly persons. Further, Petitioner's argument is self-
21 defeating because if long-term care insurance was not a form of disability insurance
22 and if the provisions of Chapter 48.19 RCW applied, then MetLife's rate would have
23 been implemented upon filing and would have already been in effect since August,
24 2014.

25 ⁶ Petitioner initially asserted due process protections to buttress his standing
26 argument. However, Petitioner did not contest OIC's arguments that due process
protections are not applicable to Petitioner in this matter and appears to have waived his
prior assertions regarding due process.

1 Disability insurance is defined as insurance against bodily injury, disablement,
2 or death by accident, against disablement resulting from sickness, and every insurance
3 relating thereto, including stop loss insurance. RCW 48.11.030. Long-term care
4 insurance is insurance against the risk of disablement or sickness that lasts a long-time
5 or lifetime. The Insurance Code specifically identifies this as disability insurance
6 under Chapter 48.21A RCW entitled "Disability Insurance – Extended Health." This
7 Chapter ensures that home health care and hospice care are offered as optional
8 coverage to consumers.

9 Despite Petitioner's assertions, long-term care insurance is not merely for or
10 used by elderly persons. Many people have needed and have used long-term care
11 insurance before they are elderly, for example, persons involved in a serious accident
12 or those with a chronic illness or genetic disease. Long-term care insurance is even
13 required to be offered and available for use from losses resulting from an accident.
14 *See* RCW 48.84.040. Furthermore, simply aging does not create the need for long-
15 term care. Rather, age-related sicknesses, such as stroke, Alzheimer's disease, and
16 others typically cause the need for long-term care insurance. Many people age without
17 ever experiencing the need for long-term care because they did not have an age-related
18 sickness that rendered them in need of care.

19 Similarly, Petitioner asserts that long-term care insurance protects against
20 accumulated wealth versus income. Long-term care insurance is not intended to solely
21 protect wealth and while Petitioner classifies wealth as somehow distinct from income,
22 wealth is simply earned income.

23 Additionally, long-term care insurance cannot be used simply for aging.
24 Eligibility for benefits of a long-term care insurance policy often requires that an
25 individual be medically determined to be chronically ill or have a severe cognitive
26 impairment. *See* Applicant's Motion for Partial Summary Judgment Exhibit 1, page
12. Chronic illnesses and cognitive impairments are medical illnesses.

While Petitioner asserts that that the OIC has admitted that RCW 48.19.030 is
applicable simply because the OIC has made reference to it in a briefing in another
case involving Petitioner, Petitioner did not disclose that this brief did explain that

1 long-term care insurance is a disability product and that the brief was not focused on
2 the applicability of that particular RCW. See OIC Exhibit 9 and 10: Demand for
3 Hearing and OIC's Motion for Summary Judgment. Petitioner does not disclose or
4 include the entire briefing as an exhibit because it reveals that the OIC has always
5 asserted that long-term care insurance is disability insurance. What was at issue and
6 what Petitioner failed to disclose in intentionally excerpting only a portion of the brief
7 in that matter is that both the OIC and MetLife have always classified long-term care
8 insurance as disability insurance. OIC Exhibit 9 attached hereto, Petitioner's 2014
9 Demand for Hearing, p. 3, Count 2, pg. 30, paragraph 2.4, pg. 32, and paragraph 2.13.
10 The OIC's response then was no different from the response today:

11 "Washington law defines disability insurance to include long-term care
12 insurance. Specifically, RCW 48.11.030 defines disability insurance as
13 "insurance against bodily injury, disablement or death by accident, against
14 disablement resulting from sickness, and every insurance appertaining
15 thereto including stop loss insurance." As a result, most statutes and
16 rules pertaining to long-term care insurance fall primarily under the
17 statutes and rules applicable to disability insurance. However, statutes and
18 rules specific to long-term care insurance supplement the general
19 provisions for disability insurance. See RCW 48.83, RCW 48.84, WAC
20 284-54, and WAC 284-83. OIC Exhibit 10 attached hereto, pg 10: OIC
21 Staff's Motion For Summary Judgment

22 Petitioner was even informed that long-term care insurance is a disability product by
23 OIC actuary Scott Fitzpatrick in the prior proceeding. *Id.* at pgs. 76-79.

24 Petitioner also fails to disclose that MetLife, the insurer of Petitioner's long-
25 term care insurance product, instructed Petitioner that the product is a disability
26 product as disclosed in Petitioner's Declaration in the 2014 Demand for Hearing.
MetLife stated, "We note that you have requested that T-C Life provide you the
documents listed in your letter pursuant to RCW 48.19.300. This statute, though, does
not apply to disability insurance as stated in RCW 48.19.010. Under Washington law,
long-term care insurance is a form of disability insurance as prescribed in RCW
48.11.030. Accordingly, the statute cited in your letter is inapplicable here..." OIC
Exhibit 11 attached hereto, LJD Declaration #2, pg. 24. After Petitioner received this
response from MetLife, Petitioner sent MetLife a letter detailing the same arguments

1 that he has briefed in this matter. *Id.* at pgs. 25-28. MetLife's response was
2 unequivocal, "We have thoroughly reviewed the arguments raised in your latest letter,
3 however, MetLife's position remains unchanged. As stated in our letter dated
4 11/14/12, under Washington law, long-term care insurance is a form of disability
5 insurance as prescribed in RCW 48.11.030. While it is your position that you are
6 entitled to documents pursuant to RCW 48.19.300, this statute does not apply to
7 disability insurance as stated in RCW 48.19.010." *Id.* at pg. 29.⁷

8 Both Petitioner's insurer and the regulating authority have previously stated
9 that long-term care insurance is a type of disability insurance and neither party has
10 ever deviated from that interpretation. While the applicability of Chapter 48.19 was
11 not at issue in that matter, MetLife unequivocally stated that this chapter does not
12 apply to long-term insurance and even addressed Petitioner's arguments as he now
13 asserts them in this matter.

14 Furthermore, if long-term care insurance was not classified as a type of
15 disability insurance and if it was subject to Chapter 48.19 RCW, MetLife would not be
16 bound by the prior approval rules that are applicable to disability insurance which
17 ensure that any rate filing must be approved prior to use by an insurer. Instead, long-
18 term care insurance would be subject to the file and use requirements, which only
19 require that an insurer file a rate or form filing prior to using it without obtaining
20 approval from the Insurance Commissioner first. See RCW 48.19.040. This would
21 likely invalidate the Petitioner's claims as Petitioner's new rate would have been
22 implemented two years ago. The Insurance Commissioner would have had no
23 opportunity to evaluate MetLife's rate filings prior to implementation, instead these
24 new premium rates would have been immediately in effect.

25 Even if RCW 48.19.030 was applicable to long-term care insurance, the
26 Insurance Commissioner's actions were not in violation of that regulation. Petitioner
became aware of the reasons why MetLife submitted national statistics and why they
were accepted by the OIC during Petitioner's Demand for Hearing regarding MetLife's

⁷ MetLife also affirms that Chapter 48.19 is not applicable to long-term care insurance, which would include RCW 48.19.030 and RCW 48.19.040.

1 2011 rate filings. *See* OIC Exhibits 2, 3 and 4. MetLife submitted and the OIC accepted
2 national statistics because of the small number of policies sold in this product line. *Id.*
3 and Decl. of Scott Fitzpatrick. There simply are not enough policies to gain statistical
4 and actuarial accuracy to support a rate filing in a smaller number of states. *Id.*

5 Petitioner's response indicates some confusion over the OIC's assertion the
6 Petitioner did not dispute MetLife's prior submission of national rates in his challenge of
7 the 2011 rate filings. MetLife submitted national experience in the 2011 rate filing and
8 this experience was accepted by the Insurance Commissioner. *See* for example, OIC
9 Exhibit 2 submitted with Motion to Dismiss, pg. 211. In that Demand for Hearing
10 Petitioner questioned the combining of the three policies within the product line and the
11 OIC explained creditability theory in the declarations which also illustrates why national
12 rates were submitted and accepted. Petitioner now contests national experience
13 acceptance for the first time years later in yet another attempt to overturn the new
14 premium rate if he chooses to accept it at the next contracting term. Given that
15 Petitioner did not challenge the submission and acceptance of national experience in
16 2011, it likely that this now late filed challenge would be barred as untimely.

17 Even assuming that the facts in the Demand for Hearing are true, Petitioner has
18 not alleged that the data from a smaller subset of states would have been statistically
19 accurate or that the OIC's acceptance of national statistics would have produced any
20 different results. Petitioner has not alleged and demonstrated any harm in the
21 acceptance of national experience, which is the basis of Petitioner's Demand for
22 Hearing. Petitioner has not submitted expert testimony from an actuary demonstrating
23 that the use of national experience has harmed him nor has he demonstrated in any other
24 way that he has been harmed by the use of national experience in this rate filing.
25 Therefore, Petitioner cannot demand a hearing in this matter because he has not
26 demonstrated that he is aggrieved by the Insurance Commissioner's actions.

Regardless that RCW 48.19.030 does not apply to long-term care insurance,
the OIC accurately accepted national statistics to support the rate filing because those
are the best statistics that can produce accurate actuarial information given the small
number of policies sold. Further, Petitioner has failed to demonstrate that a smaller

1 subset of states would have been statistically more accurate and that it would have
2 produced any different results that would have aggrieved the Petitioner. The person
3 challenging an administrative decision bears the burden of establishing his or her
4 standing to contest the decision. Petitioner has not met his burden to demonstrate
5 harm therefore, Petitioner's Demand for Hearing must be dismissed as a matter of law.

6 4. The OIC Followed The Statutes And Regulations Governing Long-Term Care
7 Insurance When It Approved MetLife's Rate Filings, Therefore The Demand
8 for Hearing Should Be Summarily Dismissed As A Matter Of Law.

9 When it approved the 2014 MetLife rate filings, the OIC followed all
10 procedures as required by the Insurance Code. Even if RCW 48.19.030 was
11 applicable to long-term care insurance, RCW 48.19.030 does not create a mandatory
12 duty on the Commissioner to only accept rates that use Washington experience.
13 Contrary to Petitioner's assertions, RCW 48.19.030 is not mandatory nor is it nearly as
14 restrictive as Petitioner is inclined to believe. Rather, RCW 48.19.030 is instructional
15 to an insurer. RCW 48.19.030 provides that "*due consideration* in making rates for all
16 insurances shall be given to past and prospective loss experience within this state for
17 experience periods acceptable to the commissioner. If the information is not available
18 or is not statistically credible, an insurer may use loss experience in those states which
19 are likely to produce loss experience similar to that in this state." Washington
20 experience was not creditable for these rate filings; the most credible loss experience
21 given the small number of policies sold in the product line was to account for all of the
22 policies sold. MetLife submitted this information because Washington experience was
23 not creditable in accordance with actuarial and insurance industry standards. As
24 provided for in RCW 48.19.030, MetLife would have even been able to give due
25 consideration to other experience if Washington experience was simply not available
26 and would still comply with this statute, if RCW 48.19.030 would have been
applicable.

Furthermore, the only mention of any role of the Insurance Commissioner has
in RCW 48.19.030 is to find the submitted experience acceptable to him. This is not

1 mandatory language. RCW 48.19.030 does not provide that an insurer must submit
2 Washington experience, rather it states that insurers need only give due consideration
3 to Washington experience. This does not create an obligation or duty upon the
4 Insurance Commissioner to only accept Washington experience; rather the statute
5 provides that it is within the Insurance Commissioner's discretion to determine what
6 he finds acceptable. The Insurance Commissioner determined that MetLife's
7 submission of national experience was acceptable back in 2011 and when MetLife
8 filed that experience again in 2014, nothing persuaded the Insurance Commissioner
9 that this experience was now inaccurate or unacceptable.

10 The Office of the Insurance Commissioner's long-term care actuary, Scott
11 Fitzpatrick, specializing in and very experienced with long-term care insurance rate
12 filings, reviewed MetLife's 2014 rate filing and materials submitted supporting the
13 rate filings. Mr. Fitzpatrick already knew detailed historical information about this
14 particular MetLife product line, which was obtained during the course of Petitioner's
15 prior case filed in 2014 involving MetLife's 2011 rate filings for the same product.
16 While Mr. Fitzpatrick was not the actuary who approved those rate filings, Mr.
17 Fitzpatrick reviewed the entire filings, approved the actions taken by that actuary in
18 accepting the 2011 rate filings, submitted declarations regarding those rate filings for
19 the purposes of that hearing and was prepared to provide testimony in that case.⁸

20 MetLife previously received approval to submit nationwide experience during
21 the course of the 2011 rate filings due to the inability to submit Washington
22 experience that would meet actuarial and insurance industry standards to be
23 statistically credible. Actuarial and insurance industry standards require that for loss
24 ratios to be statistically credible there must be at least 1,082 active claims (claims
25 being processed at the time of the filing) in the block of insurance.⁹ See Decl. of Scott
26 Fitzpatrick. The total number of policies in Petitioner's particular policy line was only
fifty-five (55) at that time (there were other policies in the product block, but all three

⁸ The actuary who approved the 2011 MetLife rate filing had left the agency before a hearing demand was submitted by Petitioner in 2014.

⁹ This refers to the Creditability Theory as used by actuaries.

1 policies combined in the state of Washington in 2011 only total nine hundred and
2 eighty-three (983) policies, of which only a small percentage would have been in
3 active claim status. *See* OIC Exhibit 2: MetLife 2011 SERFF Filings.

4 As a result, in 2011, the Insurance Commissioner found MetLife's national
5 experience acceptable because it was the loss experience that was most creditable.
6 Later, as a result of Petitioner's first demand for hearing, Mr. Fitzpatrick reviewed and
7 agreed with OIC's decision to accept this experience to ensure that the most creditable
8 experience was available in accordance with insurance and actuarial standards. *Id.* and
9 OIC Docket #14-0187.

10 MetLife's 2014 rate filings and supporting materials were no different in any
11 other form or substance than any other typical rate filing. Decl. of Scott Fitzpatrick.
12 The purpose of MetLife's rate filings was to ensure that the policies contained funds to
13 cover future claims. In reviewing MetLife's entire rate filing and with knowledge of
14 the previous acceptance, Mr. Fitzpatrick was already aware that MetLife previously
15 submitted national experience and that MetLife could not submit Washington specific
16 experience as it would not be creditable. Given these circumstances, national
17 experience would be the most accurate experience with the small number of these
18 policies sold. *Id.*

19 The OIC spent a significant amount of time and diligence in reviewing
20 MetLife's August 14, 2014 rate filings and the actuarial information contained in these
21 rate filings. These rate filings were not approved until July 10, 2015. That same day,
22 Dispositions were entered and MetLife was notified that the Insurance Commissioner
23 approved the rate filing. *See* OIC Exhibit 1: MetLife 2014 SERFF Filings.

24 Even if RCW 48.19.030 was applicable to long-term care insurance, it only
25 provides guidance for insurers in creating rates. It provides that when a carrier is
26 evaluating a rate, due consideration of Washington experience is preferred, but that a
27 carrier may consider other experience in order to achieve creditable experience or may
28 even submit other experience if Washington experience is not available. RCW
29 48.19.030 recognizes that it is not always possible to gather enough experience to be
30 creditable utilizing only Washington State experience and provides significant

1 discretion to allow other experience data in order to gain statistically creditable
2 experience. Due to the small number of policies sold in this product line, the only way
3 to ensure creditable experience is to encompass all available policies sold. Petitioner
4 has not met his burden to demonstrate that the Insurance Commissioner violated
5 applicable laws in approving MetLife's 2014 rate filings. The OIC followed the
6 Insurance Code when evaluating the 2014 MetLife rate filings, therefore summary
7 judgment should be entered finding that there are no material facts in dispute and
8 dismiss Petitioner's Demand for Hearing as a matter of law.

9 5. A Rate Filing Once Approved Is Per Se Reasonable And Petitioner Has Not
10 Proven That The Rate Is Invalid, Therefore The Demand For Hearing Should
11 Be Dismissed On Summary Judgment As A Matter of Law

12 A rate filed with and approved by the governing regulatory agency is per se
13 reasonable. *McCarty Fin., Inc. v. Premera*, 182 Wn.App. 1, 8, 328 P.3d 940 (2014).
14 This part of the holding is in a line of cases that discuss the filed rate doctrine. The
15 filed rate doctrine states that a party cannot seek to challenge a rate filed with and
16 approved by the Washington Office of the Insurance Commissioner ("OIC") and the
17 process by which the OIC reviewed and approved the rates. *See McCarthy v.*
18 *Premera*, 347 P.3d 872, 182 Wn. 936 (Wn. 2015). Petitioner's response is that the
19 Presiding Officer should not apply the filed rate doctrine. However, the court in
20 reviewing Driscoll's appeal of his first Demand for Hearing indicated that the filed
21 rate doctrine does apply. That court held that "Petitioners' claims are barred by the
22 Filed Rate Doctrine in that they seek to challenge the premium rate filed with and
23 approved by the Washington Office of the Insurance Commissioner ("OIC") and the
24 process by which the OIC reviewed and approved the rates charged to Petitioners, both
25 of which are impermissible. *See McCarthy v. Premera*, 347 P.3d 872, 182 Wn. 936
26 (Wn. 2015)." OIC Exhibit 12 attached hereto Order Affirming Final Order of the
Insurance Commissioner. The Presiding Officer remains free to apply the filed rate
doctrine to this matter as indicated by the court in its ruling in Driscoll's appeal of his

1 2014 rate filing. There is no limitation that the filed rate doctrine could not apply in
2 this matter.

3 The filed rate doctrine presents a bar to Petitioner's claims. However, the
4 OIC's argument was focused on a portion of the courts' holdings in the filed rate
5 doctrine cases, not necessarily the applicability of the filed rate doctrine. These
6 holdings provide that once a rate filing is approved, that approval is per se reasonable.
7 The purpose of this holding is to recognize the agency's expertise in approving filed
8 rates. *Id.* Several public policies are advanced by the filed rate doctrine, including (1)
9 reinforcing the agency's authority, (2) deferring to the agency's expertise in a
10 particular industry, (3) recognizing and preserving the Legislature's determinations as
11 to the regulatory scheme by allowing for enforcement by statutorily designated state
12 officers, and (4) preventing actions from disrupting the statutory and regulatory
13 scheme for uniformity of rates. *Id.* This is not a complete bar, however Petitioner
14 needs to overcome this presumption that rates once approved are per se reasonable and
15 Petitioner has not done so.

16 Petitioner has put forth no evidence or alleged any facts that overcome the
17 presumption that the approved rate in this case is per se reasonable. Instead, Petitioner
18 simply alleges that the OIC should not have accepted MetLife's filing because the loss
19 experience was national experience. Petitioner did not allege or demonstrate that a
20 combination of different sets of states would have been more creditable or that he was
21 harmed in any way by the OIC's discretionary acceptance of MetLife's loss
22 experience. Petitioner merely speculates on the reasoning of why MetLife submitted
23 this experience and why the Insurance Commissioner permitted the use of this
24 experience without any first-hand knowledge of the events surrounding the rate filing
25 or any actual evidence supporting his allegations.

26 The OIC is the governing regulatory authority for long-term care insurance and
rate filings approved by the OIC are per se reasonable. There was no evidence or facts
submitted or harm alleged by the Petitioner that would undermine this presumption.
The public policies advanced by this presumption are especially poignant to the
difficult nature of long-term care insurance and are served by its application to this

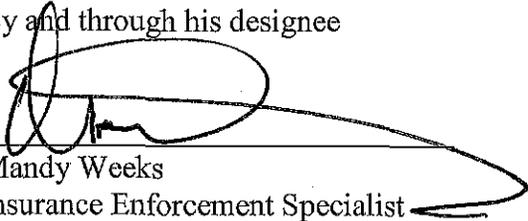
1 matter, including (1) reinforcing the agency's authority, (2) deferring to the agency's
2 expertise in a particular industry, (3) recognizing and preserving the legislature's
3 determinations as to the regulatory scheme by allowing for enforcement by statutorily
4 designated state officers, and (4) preventing actions from disrupting the statutory and
5 regulatory scheme for uniformity of rates. The Insurance Commissioner approved
6 MetLife's rate filings and the approval of those rate filings is per se reasonable.
7 Petitioner has not submitted facts or proven that the Insurance Commissioner's
8 approval of the rate filing was unreasonable, therefore the Demand for Hearing should
9 be dismissed as a matter of law.

10 VI. CONCLUSION

11 For these reasons, OIC staff requests entry of an order dismissing Petitioner's
12 Demand for Hearing as a matter of law, or in the alternative, entry of an order finding
13 that there is no genuine issue of material fact and that the OIC is entitled to judgment as
14 a matter of law.

15 DATED this 20th day of May, 2016.

16
17 MIKE KREIDLER
18 Insurance Commissioner
19 By and through his designee

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21 Mandy Weeks
22 Insurance Enforcement Specialist
23 Legal Affairs Division
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CERTIFICATE OF MAILING

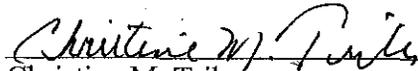
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing OIC'S REPLY IN MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY JUDGMENT on the following individuals in the manner indicated:

Leo Driscoll and Mary Driscoll
4511 E. North Glenngrae Ln.
Spokane, WA 99223
oleod1@msn.com (Parties have electronic service agreement)
Via U.S. Mail and Email

OIC Hearings Unit
Attn: William Pardee, Chief Presiding Hearings Officer
Office of the Insurance Commissioner
5000 Capitol Blvd
Tumwater, WA 98501
hearings@oic.wa.gov
Via Hand Delivery and Email

SIGNED this 20th day of May, 2016, at Tumwater, Washington.


Christine M. Tribe

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CERTIFICATE OF MAILING

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing OIC'S REPLY IN MOTION TO DISMISS, OR IN THE ALTERNATIVE, SUMMARY JUDGMENT on the following individuals in the manner indicated:

Leo Driscoll and Mary Driscoll
4511 E. North Glenngrae Ln.
Spokane, WA 99223
oleod1@msn.com (Parties have electronic service agreement)
Via U.S. Mail and Email

OIC Hearings Unit
Attn: William Pardee, Chief Presiding Hearings Officer
Office of the Insurance Commissioner
5000 Capitol Blvd
Tumwater, WA 98501
hearings@oic.wa.gov
Via Hand Delivery and Email

SIGNED this 20th day of May, 2016, at Tumwater, Washington.


Christine M. Tribe