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BEFORE THE STATE OF WASHINGTON  
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of  
Business Health Trust,  
Applicant.

Docket No. 14-0246  
COMMISSIONER'S BRIEF  
REQUESTING A DETERMINATION  
OF NO THREATENED AGENCY  
ACTION

I. INTRODUCTION

The Commissioner has requested this opportunity to brief a threshold question: Under RCW 48.04.010, is the mere fact that the Commissioner will fulfill his regulatory duty to complete his review of a large group health plan filing, a "threatened act" that serves as the basis for a third party to demand a hearing?

The mere fact that the Commissioner will complete his statutory obligations to review a filing for compliance with the law cannot be a "threatened act" that entitles a third party to a hearing. As a result, a third party citing only this type of threatened action is not entitled to an automatic stay under RCW 48.04.010(1). Therefore, the Commissioner requests a determination that no "threatened act" has been asserted by Plaintiff Business Health Trust (BHT), and therefore no automatic stay is in effect.

II. FACTS

The Commissioner has the duty to enforce the insurance code, a broad responsibility which governs "all insurance and insurance transactions in the state. . .and all persons having

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1 to do therewith. . .". RCW 48.01.020. This broad authority includes the duty to review rate  
2 and form filings submitted by health plan issuers, such as Premera. RCW 48.44.020<sup>1</sup>;  
3 WAC 284-43-920. All issuers who wish to sell plans in Washington are required to submit  
4 those plans to the Commissioner for review. WAC 284-43-920. For large group health plans,  
5 issuers can submit plans to the Commissioner for review, up to 30 days after the plan has been  
6 sold. WAC 284-43-920(2). However, the Commissioner retains the authority and obligation  
7 to review large group health plan filings, and to disapprove them if they do not comply with  
8 the requirements of the Insurance Code (Title 48 RCW), or applicable federal laws, such as  
9 the Patient Protection and Affordable Care Act (Affordable Care Act). RCW 48.44.020(2-3);  
10 WAC 284-43-125.

11 As part of the review process, the Commissioner's staff engage in a multi-disciplinary  
12 review of the rates, the insurance contracts, and the proposed network. This review process is  
13 collaborative. Prior to disapproval, carriers receive objections detailing shortcoming in the  
14 filing, and are given an opportunity to provide additional information and correct deficiencies.  
15 The process concludes when the Commissioner issues either an approval, or a disapproval of  
16 the health plan filing. If the Commissioner determines that a health plan filing cannot be  
17 approved because it does not comply with the law, the Commissioner will disapprove the plan,  
18 and provide the issuer with the basis for his decision.

19 On February 12, 2014, Premera Blue Cross ("Premera") filed 13 large group health  
20 plans on behalf of thirteen individual associations and related trusts ("Premera's association  
21 health plans") for the 2014 plan year. Premera, as a health care service contractor ("HCSC"),  
22 is required to submit all large group health plan filings to the Commissioner. WAC 284-43-  
23 920(2). The Commissioner began his review of Premera's health plans, requesting additional  
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25 <sup>1</sup> RCW 48.44.020 is specific to health care service contractors. Other sections of the Washington State  
26 Insurance Code vest the Commissioner with the same authority to review health plans filings submitted by other  
types of authorized health plan issuers. However, because Premera is registered as a health care service  
contractor, this brief will primarily cite only to the provisions applicable to Premera.

1 information and documentation concerning their filings. Premera's association filings have  
2 been in review for 10 months, and there have been a minimum of two sets of objections sent  
3 and responses provided in each filing.

4 In anticipation of a determination disapproving the plans, BHT (purportedly  
5 representing the interests of Premera's association health plans) filed a request for hearing<sup>2</sup> on  
6 December 17, 2014. The basis for their request is the allegation that in a meeting on  
7 December 15, 2014, the Commissioner purportedly "threatened" to disapprove Premera's  
8 health plan filings for 2014. The Commissioner disputes BHT's characterization of the  
9 attendees, and the conversation that occurred in that meeting. The Commissioner's pending  
10 decision on the Premera Health Plan filings is the only "threatened agency action" alleged by  
11 BHT in its hearing demand. BHT did not allege any threatened enforcement action by the  
12 Commissioner. In its demand for hearing<sup>3</sup>, BHT argues it is entitled to an automatic stay of  
13 "the OIC's threatened action." BHT 12/17/14 Request for Hearing at 2. Because BHT has  
14 informed the Commissioner's staff that it believes the automatic stay provisions of RCW  
15 should apply to the Commissioner's pending decision on Premera's health plan filings, the  
16 Commissioner has not issued a final decision regarding his review of Premera's 2014  
17 association health plans filings.

### 18 III. ARGUMENT

19 First, BHT has failed to show facts sufficient to support its claim that the  
20 Commissioner had threatened disapproval at the time the hearing was requested. Moreover,  
21 as a matter of law, the Commissioner's indication that he will satisfy his statutory

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23 <sup>2</sup> BHT has also filed a suit for declaratory judgment in federal court. In briefing to that court, BHT has  
24 alleged that the letter sent to the hearings unit on December 17, 2014, was not actually a request for a hearing.  
25 Because the hearings unit has treated this as a request for a hearing, and because the letter requests an automatic  
26 stay that is only applicable in the hearing context, the Commissioner will assume the letter constitutes a request  
for hearing, for the purposes of this brief.

<sup>3</sup> BHT's demand for hearing also raises issues of jurisdiction, the Commissioner's authority to make a  
determination of an association "employer", and a request for a stay pending the outcome of a federal suit. This  
brief is restricted to the threshold issue of whether "threatened agency action" can be pled in the context of filing  
review.

1 responsibility to review a health plan filing cannot constitute a “threatened act” by the  
2 Commissioner. The Insurance Code does not allow a pre-emptive stay of a final  
3 determination of a health plan filing submitted by an HCSC. Granting an automatic stay to  
4 prevent a final determination in a health plan rate filing creates a dangerous precedent that  
5 would allow any one to hijack the rate review process for personal or political purposes.

6 **A. The Insurance Commissioner Did Not Threaten To Disapprove Premera’s Rate**  
7 **Filing**

8 The Commissioner must hold a hearing upon demand only if the demanding entity is  
9 aggrieved by the Commissioner’s act, threatened act, or failure to act. RCW 48.04.010(1)(b).  
10 In this case, at the time BHT demanded a hearing based on the allegation that the  
11 Commissioner threatened to reject Premera’s rate filing, the Commissioner had made no such  
12 threat.

13 The support BHT offers for its claim that there was, on December 17, threatened  
14 agency action, is a letter from the Commissioner to Maud Daudon of the Seattle Chamber of  
15 Commerce, dated October 28, 2014. The letter contains no statements regarding the rejection  
16 of Premera’s rate filing. Rather, the letter merely identified the work that the Commissioner  
17 and others have done to identify possible issues, acknowledged those issues, and asserted that  
18 the Commissioner’s staff would review the pertinent documentation. Commissioner Kreidler  
19 Letter to Maud Daudon, dated October 28, 2014. In fact, contrary to any contention that the  
20 Commissioner threatened his intent to act in a particular manner, the letter stated that the  
21 Commissioner’s “decisions will be communicated” in the future. This does not amount to a  
22 “threatened act” to reject Premera’s rate filings. The Commissioner’s “expression of doubts”,  
23 is the same alleged threat that was communicated at the December 15, 2014, meeting (see  
24 BHT hearing request). These statements of doubt do not rise to the level of a threatened  
25 agency action.  
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1 **B. Only Threatened Enforcement Action Is Properly Subject To The Automatic**  
2 **Stay Found In RCW 48.04.020**

3 As noted above, the Commissioner's authority to administer the Insurance Code is  
4 broad. And the duties, powers and remedies conferred on the Commissioner are  
5 correspondingly broad. These activities include distinct regulatory and enforcement activities.

6 The Commissioner *regulates* the insurance industry through examinations, licensing  
7 authority, and review of plans. Individuals who wish to sell or market insurance in  
8 Washington, including issuers and producers, are required by statute to submit to the  
9 Commissioner's proactive review of their business and their products. For example, the  
10 Commissioner examines insurers prior to issuing certificates of authority to ensure the  
11 company has the ability to carry out the business of insurance. RCW 48.05.110. He regularly  
12 reviews and examines financial information submitted by admitted insurance companies and  
13 other regulated entities, such as HCSCs, to ensure they remain financially solvent and able to  
14 pay claims. RCW 48.03.005. These examinations are designed to ensure that consumers will  
15 receive the benefits they are entitled to by law, and by the contracts they have purchased.  
16 Similarly, the Commissioner reviews insurance rates and forms submitted to his office, to  
17 ensure compliance with the law. RCW 48.44.020.

18 Where the Commissioner's review is mandated by law, issuing an ultimate decision  
19 concerning that review cannot be "threatened" action. It is a necessary part of the  
20 Commissioner's obligation to fulfil his statutorily assigned duties to review and examine the  
21 players in the insurance market, and the products that they sell. The reviews and  
22 examinations mandated in the Insurance Code are not "threatened"; they are promised.  
23 Review of health plan rate and form filings is clearly a proactive, regulatory activity. For  
24 issuers who must submit their products for review, this review is a necessary requirement as  
25 part of the privilege of participating in the highly regulated Washington insurance market.

26 In contrast, the Commissioner also *enforces* the Insurance Code by levying penalties  
and fines, bringing actions in any court of competent jurisdiction (RCW 48.02.060), revoking

1 licenses, and imposing other sanctions as allowed under the Insurance Code. Typically, the  
2 Commissioner's enforcement activity follows a decision based on his regulatory review. For  
3 example, after reviewing a carrier's financial statements, and finding that the carrier's  
4 financial health is at risk, the Commissioner may order, or threaten to order, increased  
5 monitoring, administrative oversight, or even receivership of a company. (See Chapter 48.31  
6 RCW). These types of discretionary decisions, that impose individualized requirements on  
7 licensees and issuers, are the kinds of action that can be threatened.

8       Clearly, review of a health plan rate and form filing is a regulatory function, required  
9 by the Insurance Code. RCW 48.44.020(2) recognizes the distinction between the regulatory  
10 function of the Commissioner's review process, and the enforcement nature of any subsequent  
11 enforcement order. RCW 48.44.020(2) provides that "The commissioner may on  
12 examination, subject to the right of the health care service contractor to demand and receive a  
13 hearing under chapters 48.04 and 34.05 RCW, disapprove any individual or group contract..."  
14 For HCSCs, the Legislature recognized that first, the Commissioner must review, or examine  
15 a health plan filing, and then, issue a decision, which may include a disapproval. After that  
16 decision is issued, then parties can assert a challenge to the Commissioner's determination,  
17 but not before. This is also the case for entities other than HCSCs. In RCW 48.19.100, the  
18 Insurance Code recognizes that after the Commissioner examines a filing submitted for his  
19 review, he then issues a decision concerning that filing. Similarly, for special filings, the  
20 Commissioner reviews the filing and issues a decision. RCW 48.19.110. After that decision  
21 is issued, the entity that submitted the filing is free to request a hearing.

22       After the Commissioner's decision has been made concerning the underlying rate  
23 filing, an HCSC has the ability to request a hearing concerning that determination.  
24 RCW 48.44.020(2). Arguably, anyone else who can demonstrate that they are aggrieved by a  
25 decision issued by the Commissioner would also have that ability under  
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1 RCW 48.04.010(1)(b). But until that decision is made, there is no hearing to be had based  
2 solely on the fact that the Commissioner will carry out his statutory duty.

3 In addition, there is no practical need for an automatic stay of a filing determination.  
4 Unlike an enforcement action, which may result in an order from the Commissioner that takes  
5 immediate effect, a disapproval provides a period of planning and transition prior to any  
6 discontinuation notices are sent to consumers. Practically, this means that there is ample time  
7 to request a hearing and seek a stay from the hearings officer prior to any action that must be  
8 taken.

9 However, there are important reasons why the Commissioner's ability to issue a final  
10 determination is important to prevent potential harm to issuers, and disruption of the market.  
11 For example, in the large group context, health plans can be sold before they are filed with the  
12 Commissioner. Therefore an issuer may not be notice that its plan violates the law, and  
13 should not be sold, until it is disapproved. However, an issuer can be subject to penalties for  
14 any sale of a product that does not comply with the law, from the date of the sale, regardless  
15 of the lack of a final decision from the Commissioner. Particularly in instances like this,  
16 where a product has been sold in the market place, allowing third parties to delay the  
17 Commissioner's final decision can be detrimental to the very entities requesting the review,  
18 and entitled to a complete determination under the Insurance Code.

19 In addition, consumers may be completely unaware that they are purchasing a plan  
20 that does not comply with the law, if the Commissioner is prevented from issuing his final  
21 determination. The predictable result is that anyone could stay every regulatory review by the  
22 Commissioner that might result in a negative outcome, even if they know that a health plan  
23 filing contains provisions that violate the law. Particularly for large group plans, carriers  
24 could file plans they know are deficient, request a stay because the Commissioner has  
25 "threatened" to review and issue a determination concerning their plans, and continue to sell  
26 that product, free of any regulation, and in blatant violation of the law.

1 Further, if merely issuing a final decision on a rate filing is considered threatened  
2 agency action, any third party could have the power to automatically stay any determination  
3 by the Commissioner. This could have disastrous result in the individual and small group  
4 markets. In the individual and small group markets, there are strenuous timelines imposed by  
5 federal law for the review of health plans. If a final decision on a rate filing constitutes  
6 “threatened agency action”, politically motivated groups objecting to, or insisting on coverage  
7 for various health services (such as abortion or transgender services) could demand a hearing  
8 on the eve of the deadline for approving health plans, due to a moral objection to the way a  
9 plan covers those types of services. Allowing third parties to hijack the health plan review  
10 process would significantly hamper the effective regulation of the insurance industry, an  
11 outcome contrary to the core objectives of the insurance code. *See McCarthy Fin., Inc. v.*  
12 *Premera*, 182 Wn. App. 1 (2014)(approving the filed rate doctrine that advances policies of  
13 “(1) reinforcing the agency’s authority to determine the reasonableness of rates, (2) deferring  
14 to the agency’s expertise in a particular industry, (3) recognizing and preserving the  
15 legislature’s determinations as to the regulatory scheme by allowing for enforcement by  
16 statutorily designated state officers, and (4) preventing lawsuits from disrupting the statutory  
17 and regulatory scheme for uniformity of rates.”)

18 Permitting a hearing to be based on nothing more than the fact that the Commissioner  
19 will fulfill his statutory obligation to review and issue a decision based on his review, would  
20 be a significant deprivation of the Insurance Commissioner’s regulatory authority and  
21 oversight. The result would be increased consumer harm from the marketing of non-  
22 compliant plans. And if a hearing and automatic stay can be requested by a party other than  
23 the filing issuer, it can lead to serious market disruption and financial harm to issuers and  
24 consumers.

25 There is no question, at this point, that the Commissioner’s decision will be to  
26 disapprove *Premera*’s filings. The Commissioner has now completed his review, and on

1 December 19, 2014, uploaded his decision into the electronic system used by the  
2 Commissioner to review rate and form filings. It has not been issued, pending this tribunal's  
3 decision concerning this matter. Until that decision is issued through the Commissioner's  
4 electronic form filing system, the Commissioner's statutory obligation to review Premera's  
5 filings is not complete. And if this tribunal determines that the automatic stay is allowed to  
6 apply before the Commissioner's review of a health plan filing is complete, Premera may  
7 never receive the Commissioner's determination that its plans violate the law. Therefore  
8 Premera, BHT, and any other third party who wants to gut the Commissioner's regulation of  
9 large group health plans, can easily do so, by simply requesting a hearing whenever a health  
10 plan filing is submitted. This is not merely a speculative parade of horrors. There is another  
11 pending third party hearing request before this tribunal, from the Association of Washington  
12 Businesses (AWB), demanding a stay of the Commissioner final decision, for a large group  
13 health plan filing that was not even submitted at the time the hearing demand was issued.  
14 Similarly, BHT seems to be asking for the stay in this matter to extend to Premera's 2015  
15 large group health plan filings which will not be submitted until February. The only basis for  
16 these hearings is the Commissioner's confirmation that he will complete the review he is  
17 required to complete under RCW 48.44.020.

18 **IV. CONCLUSION**

19 BHT has failed to allege any conduct by the Commissioner that is appropriately  
20 considered a "threatened act" under the Insurance Code. The effective regulation of the large  
21 group market depends on the Commissioner's ability to issue final determinations following  
22 his review of health plan filings. For these reasons, this tribunal should determine that BHT  
23 has failed to assert any threatened agency action, and therefore is not entitled to an automatic

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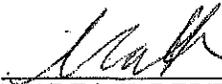
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1 stay that will prevent the Commissioner from carrying out his statutory obligations to issue  
2 decisions concerning the health plan filings submitted for his review.

3 RESPECTFULLY SUBMITTED this 22nd day of January 2015.

4 ROBERT W. FERGUSON  
5 Attorney General

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7 MARTA U. DELEON, WSBA #35779  
8 Assistant Attorney General  
9 Attorneys for Insurance Commissioner

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**PROOF OF SERVICE**

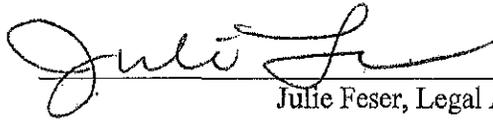
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 22 day of January, 2015, at Olympia, Washington.



Julie Feser, Legal Assistant