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BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

In the Matter of **Seattle Children's Hospital,** A Washington Not-For-Profit Corporation, and **Coordinated Care Corporation**, a Health Maintenance Organization; **Bridgespan Health Company**, a Health Services Contractor; and **Premera Blue Cross**, a Health Services Contractor, Intervenors.	**Docket No. 13-0293** ORDER ON INSURANCE COMMISSIONER'S MOTION TO DISMISS

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NATURE OF PROCEEDING

This matter concerns the Insurance Commissioner's Motion to Dismiss this matter in its entirety. More specifically, on October 23, 2013 Seattle Children's Hospital filed a Demand for Hearing to contest the Insurance Commissioner's July 31, 2013 approvals of the individual market Exchange filings of Coordinated Care Corporation, Premera Blue Cross and Bridgespan Health Company (a subsidiary of Regence Blue Shield), arguing that the Insurance Commissioner's approval of these Exchange filings was not in compliance with the federal Affordable Care Act because they do not include Seattle Children's Hospital in their networks. In response, on January 15, 2014 the Insurance Commissioner filed a Motion to Dismiss this case, arguing, briefly, that the case is nonjusticiable because there is no remedy that can be provided herein, and that aside from the issue of nonjusticiability Seattle Children's Hospital's arguments have no legal merit. On January 29, Seattle Children's Hospital filed its Opposition to OIC Staff's Motion to Dismiss and on February 3 the parties presented oral argument before the undersigned. The purpose of this proceeding was to consider and decide this matter based upon the above-referenced pleadings and on the authorities cited and evidence presented therein, and upon the arguments presented by the Insurance Commissioner and Seattle Children's Hospital during oral argument on this Motion, and to enter the final decision herein.[1]

[1] It is noted that on December 2 and 3, these three health carriers filed motions to intervene in this proceeding, asserting they had significant interests in any decisions that would be entered herein. Following briefing on this issue, and the OIC's expression of support for intervention included in prehearing conference held November 18, it was determined these carriers met the criteria for intervention set forth in RCW 34.05.443 and therefore they were granted intervention on December 19. The Intervenors filed no briefs either supporting or opposing the OIC's Motion to Dismiss, but instead filed a joint Motion for Summary Judgment which is addressed in a separate Order.

INSURANCE COMMISSIONER'S ARGUMENTS IN SUPPORT OF DISMISSAL

Briefly, as set forth in the Insurance Commissioner's ("OIC" or "Commissioner") Motion to Dismiss filed January 15, 2014 and at oral argument presented on February 3, the OIC moves to dismiss this matter based upon two arguments: I. While the OIC's approval of the subject Exchange plans may have been an "*act of the Insurance Commissioner*" by which Seattle Children's Hospital ("SCH") is "*aggrieved*" under RCW 48.04 which confers the right to hearing before this agency, this case must be dismissed because the issues in this case are not justiciable because a) the Washington Health Benefit Exchange and the U.S. Department of Health and Human Services have certified these plans as qualified health benefit plans under the federal Affordable Care Act which certification implicitly includes a final determination that their networks are adequate, and therefore even if SCH could demonstrate that any of the plans fail to meet the federal standards the decision whether to decertify a plan is a decision that is ultimately for the Washington Health Benefit Exchange and not for this tribunal to make; b) this tribunal has no jurisdiction to force any health carrier to contract with any particular provider; c) this tribunal has no jurisdiction to try the merits of Premera's contract dispute with SCH; and d) second guessing the OIC's approval of these Exchange plans at this late date serves no practical or legal purpose because this tribunal can provide no final, conclusive or effective remedy for SCH's alleged injury. II. The OIC finally argues that, the above justiciability argument aside, SCH's Demand for Hearing is devoid of substantive legal merit and should be dismissed on that basis.

I. <u>The Insurance Commissioner argues that SCH has no right to hearing under RCW 48.04.010 because the Commissioner's acts (in approving the subject Exchange plans) present no justiciable controversy in so far as SCH is concerned.</u>

A. SCH's right to hearing under RCW 48.04.010.

RCW 48.04.010, cited by the OIC, provides:

> *(1) The commissioner may hold a hearing for any purpose within the scope of this code as he or she may deem necessary. The commissioner shall hold a hearing: ... (b) ... upon written demand for a hearing made by any person aggrieved by any act, ... of the commissioner ....*[2]

As the OIC notes, the legislature has defined agency "action" in Title 34.05 RCW, the Administrative Procedure Act, as follows:

[2] It is undisputed that pursuant to RCW 48.01.070 "person" includes entities such as SCH as well as individuals.

> (2) *"Agency action" means licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, ... or the granting or withholding of benefits.*[3] RCW 34.05.010(3).

The OIC argues that the approvals of the three Exchange plans which are challenged by SCH "*do not involve licensing, statutory enforcement, ... benefits, ... leaving only the 'implementation' of a statute as a jurisdictional basis for conducting an adjudicatory administrative proceeding. But here, OIC's "implementation" of network adequacy statutes presents no justiciable controversy in so far as SCH is concerned.* Apparently, therefore, the OIC does not dispute that this matter involves *acts of the Commissioner* for purposes of RCW 48.04.010, and in its Motion the OIC does not dispute that SCH is *aggrieved* by those acts as contemplated by RCW 48.04.010, and that therefore SCH has a right to hearing strictly under the wording of RCW 48.04.010. If, instead, the OIC disputes whether SCH has a right to hearing strictly under the wording of RCW 48.04.010, it is here concluded that the OIC's actions in approving the Exchange filings do indeed constitute acts of the Commissioner involving "*implementation or enforcement of a statute*" as well as "*application of an agency rule*" under RCW 48.04.010(1) and RCW 34.05.010(3) and the OIC having presented no argument in the OIC's Motion to Dismiss that SCH is *aggrieved* by those acts of the Commissioner, it is hereby concluded that SCH has shown valid bases for jurisdiction for conducting an adjudicatory proceeding before this tribunal under the strict wording of RCW 48.04.010.

B. Authorities cited by the OIC to support this Motion to Dismiss.

The OIC asserts, however, that while, as above, it apparently does not dispute SCH's right to hearing under the wording of RCW 48.04.010, this case should be dismissed because the issues herein are not justiciable.

As SCH asserts, the OIC offers no statutory or regulatory authority to support a conclusion that the mandatory hearing right conferred by RCW 48.04.010 can be withheld by this tribunal on the basis that this tribunal may not be able to "provide final and conclusive" relief to SCH. The OIC does cite Washington Education Association v. Public Disclosure Commission, Marley v. Dep't of Labor & Industries and Inland Foundry Co. apparently as authority to support its Motion to Dismiss based on lack of justiciability but none of these cases support the OIC's argument.

Washington Education Association v. Public Disclosure Commission, 150 Wn.2d 612, 80 P.2d 608 (2003) *(WEA)* involved a situation where the Washington Education Association appealed a state agency's (the Public Disclosure Commission) issuance of an interpretive guideline (concerning the application of certain rules governing election campaigns based on federal and state law) directly to the King County Superior Court. On appeal, the Washington Supreme Court held that the Superior Court should have dismissed this case as nonjusticiable because *whether the guidelines are a correct or incorrect interpretation of the law presents*

[3] RCW 34.05.010(3) provides many examples of what "agency action" does not include, none of which the OIC argues exist herein.

nothing more than an academic or hypothetical question. The guidelines have no legal or regulatory effect, and the PDC's issuance of the guidelines does not implicate actual or direct legal interests of the WEA. The WEA has not alleged an actual, present, existing dispute, or the seeds of a mature one ... the trial court erred in reviewing the claims. Clearly *WEA* presented a much different situation from the one herein. Contrary to the agency's issuance of guidelines interpreting rules in *WEA*, the actions of the Commissioner at issue herein were specific approvals of specific Exchange filings which approvals were strictly required before they could be certified by the Washington State Health Benefits Exchange and the federal government and to be put onto the market on January 1, 2014. Contrary to the PDC's "guidelines" in *WEA*, the actions of the Commissioner do present more than an "academic or hypothetical question." Contrary to the PDC's guidelines in *WEA*, the Commissioner's approvals of the Exchange filings clearly have legal and regulatory effect. Contrary to the PDC's issuance of guidelines in *WEA*, the Commissioner's approvals of the Exchange filings do implicate actual legal interests of SCH. Finally, contrary to the PDC's issuance of guidelines in *WEA*, as opposed to the WEA in *WEA*, SCH has alleged an "actual, present, existing dispute or the seeds of a mature one."

In addition, *WEA* concerned a private entity appealing a state agency's interpretations directly to the King County Superior Court (the judicial branch) and not a private entity appealing a state agency's actions to a quasi-judicial tribunal in the executive branch such as this tribunal herein. The WEA might well have had a right to have its appeal heard in a quasi-judicial forum which entertains appeals of PDC's interpretations, just as given the right situation the Commissioner's promulgation and/or interpretation of rules might be properly appealed to this tribunal. As SCH argues, *WEA* addressed the influences of the judicial branch on the executive function. Here, this tribunal is part of the executive branch, is a quasi-judicial tribunal, and this forum could be characterized as (as SCH characterized it) "*the Commissioner's last chance to get it right*" before a case does commence in the judicial branch by way of an appeal of this tribunal's ruling to the Superior Court or Court of Appeals.

The OIC also cites Marley v. Dep't of Labor & Industries, 125 Wn.2d 533, 8986 P.2d 189 (1994) (*Marley*) as authority for its argument that this case lacks justiciability and therefore must be dismissed. As the Washington Supreme Court noted, the central issue in *Marley* involved a final decision rendered by an executive quasi-judicial tribunal in the Washington Department of Labor and Industries ("L & I"). Claimant Marley was denied her industrial insurance claim by L & I staff, appealed the denial to L & I's quasi-judicial executive tribunal. That tribunal was an administrative law judge acting for the Director of L & I, similar to the tribunal herein which is an administrative law judge acting for the Insurance Commissioner. As the Supreme Court noted, the central issue in *Marley* was whether that agency's tribunal had subject matter jurisdiction. In deciding that the L & I's executive quasi-judicial tribunal had subject matter jurisdiction, the Supreme Court noted that *A judgment may properly be rendered against a party only if the* [tribunal] *has authority to adjudicate the 'type of controversy' involved in the action. We italicize the phrase 'type of controversy' to emphasize its importance. A court or agency does not lack subject matter jurisdiction solely because it may lack authority to enter a given order. The term 'subject matter jurisdiction' is often confused with a court's 'authority' to rule in a particular manner. This has led to improvident and inconsistent use of the*

term. ... A tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate. The focus must be on the words 'type of controversy.' The Supreme Court went on to state that in RCW 51.04.010 the Legislature has granted the Director of L & I broad authority to determine the validity of claims for workers' compensation and provided a quasi-judicial tribunal to hear and adjudicate appeals from that agency's acts in determining the validity of workers' claims (just like the Insurance Code has granted the Commissioner broad authority to regulate insurance carriers and their health plans and has provided a means of aggrieved parties to appeal the Commissioner's regulatory determinations). Therefore, in *Marley*, the court recognized that because the case was an appeal of an action of L & I, and L & I had been given authority over the "type of controversy" involved in that action, L & I's quasi-judicial executive tribunal acting for the Director of L & I had subject matter jurisdiction over that appeal of that agency's act. Insofar as it is relevant, *Marley* seems to be in opposition to, rather than support of, the OIC's arguments herein.

In Inland Foundry Co. v. Spokane County Air Pollution Control Authority, 98 Wn.App. 121, 989 P.2d 102 (1999) the court simply holds that an administrative agency "*has only the jurisdiction conferred by its authorizing statute.*" *Id. at 124.* Similarly here, where this tribunal derives its authority from RCW 48.04.010, it is bound by the language of that statute to hold the hearing sought by the demand presented to it. As with *Marley* above, this case seems to be in opposition to, rather than in support of, the OIC's Motion to Dismiss.

For the above reasons, in addition to having shown no statutory authority to support its Motion to Dismiss, the OIC has not shown sufficient authority to have this case dismissed under *WEA*, *Marley* or *Inland Foundry* or to show that the principles of justiciability articulated in *WEA* even apply to this situation. Even so, the arguments raised by the OIC concerning justiciability are reviewed below.

C. The OIC's specific arguments concerning justiciability.

1) Justiciability: the OIC argues that even if SCH is deemed to have standing to contest the Commissioner's acts (in approving the subject Exchange plans), there is no relief this tribunal can grant SCH that will be final and conclusive and within the Commissioner's adjudicatory jurisdiction because this tribunal cannot decertify the Exchange plans so this case should be dismissed.

The OIC asserts *First, the Washington Health Benefit Exchange and the United States Department of Human and Health Services* [sic] *have certified these three plans as qualified health benefit plans under the federal Affordable Care Act. These certifications carry with them the final determination in the approval process that the carriers' networks are adequate. ... Even if [SCH] could demonstrate that any of the three plans that are the subject of its Demand for Hearing fails to meet these standards, ... the decision whether to decertify a plan offered through a state exchange is a decision that is ultimately for the Exchange, not an OIC administrative law judge, to make. ... In short, this is not the tribunal and an RCW 48.04.010 hearing is not the process for decertifying a qualified health plan.*

As SCH asserts, SCH is not asking this tribunal to decertify these plans and so the OIC's argument here lacks merit for this reason alone. Additionally, ,apparently the OIC here is asserting, without providing authority for, the proposition that the fact that the Washington Health Benefit Exchange and the Secretary of the U.S. Housing and Human Services agency have certified these Exchange plans in some way deprives SCH of its, SCH argues, clear right to challenge the validity of the Commissioner's actions in this forum and this tribunal's mandatory obligation to entertain that challenge in an administrative proceeding before this tribunal under the wording of RCW 48.04. (As SCH argues, the fact that the Commissioner had authority to deny approval in the first place, and the further fact that the plans could not operate on the Exchange without his approval, belies the notion that the Commissioner's action is not subject to normal appeal procedures. In addition, it is the Commissioner's responsibility to ensure that these plans also meet state law and regulations regarding network adequacy.)

2) **Justiciability: the OIC argues that even if SCH is deemed to have standing to contest the Commissioner's acts (in approving the subject Exchange plans), there is no relief this tribunal can grant SCH that will be final and conclusive and within the Commissioner's adjudicatory jurisdiction because this tribunal has no jurisdiction to force any health carrier to contract with any particular provider and so this case should be dismissed.**

The OIC argues that *this tribunal has no jurisdiction to force any health carrier to contract with any particular provider. Depriving thousands of Washington residents of the coverage they selected surely provides no "relief" to SCH. This tribunal simply cannot unwind the events that have taken place since the plans were approved. If the OIC now reverses its approval of these plans as* [SCH] *requests,* [SCH] *will be in exactly the same legal position it is in today. It will still have no contract with* [the carriers] *and no individual will have a more sufficient or adequate choice of providers than he or she does today.*

In response, SCH argues that the Commissioner has the duty to enforce state laws requiring that the health plans he regulates obtain and maintain adequate networks at all times. As part of this duty, SCH argues, the Commissioner is authorized to, should be, and is, routinely involved in assessing carriers' networks and, when appropriate, requiring that they obtain additional providers in certain categories of providers or certain regions in order to ensure that they comply with network adequacy laws and regulations at all times.

The OIC may be correct in arguing that this tribunal has no jurisdiction to force any health carrier to contract with any particular provider. However, contrary to the OIC's characterization of the issue, SCH's Demand challenges the validity of the Commissioner's actions in approving the Exchange filings and is not asking that these three carriers be forced to contract with SCH. Therefore, the OIC's argument here is without merit. In addition, as in B. above, the OIC's argument here fails to recognize the distinction between a court's judicial function and this tribunal's quasi-judicial executive function, failing to recognize that, as SCH asserts, the undersigned reviews this case on behalf of the Commissioner before a case does

commence in the judicial branch by way of an appeal of this tribunal's ruling to the Superior Court.

3) **Justiciability: the OIC argues that even if SCH is deemed to have standing to contest the Commissioner's acts (in approving the subject Exchange plans), there is no relief this tribunal can grant SCH that will be final and conclusive and within the Commissioner's adjudicatory jurisdiction because this tribunal has no jurisdiction to try the merits of Premera's contract dispute with SCH.**

The OIC asserts that *The parties to the contract have committed such disputes to mediation and superior court. No adjudication this tribunal can render will finally and conclusively resolve the meaning of the Hospital's contract with Premera. The OIC staff respectfully submits that jurisdiction to adjudicate such contract disputes is neither ancillary to, nor necessarily implied in, the Commissioner's limited jurisdiction under RCW 48.04.010....*

As in 2) above, the OIC incorrectly characterizes this case as an attempt to try the merits of SCH's dispute with Premera. Once again, SCH's Demand challenges the Commissioner's actions in approving the Exchange filings of Coordinated Care, Bridgespan and Premera. To dismiss this case on a mischaracterization of the issue herein would in error.

4) **Justiciability: the OIC argues that even if SCH is deemed to have standing to contest the Commissioner's acts (in approving the subject Exchange plans), a decision herein would serve no practical or legal purpose.**

The OIC asserts that *[s]econd guessing the OIC's approval of these HBE plans at this late date serves no practical or legal purpose. The presiding officer can provide no final, conclusive or effective remedy for [SCH's] alleged injury. Because [SCH's] Demand for Hearing invites this tribunal to adjudicate a clearly non justiciable case, the Demand for Hearing should be dismissed as a matter of law.* As discussed in B. above and elsewhere, the OIC offers no statutory or regulatory authority or case law to support a conclusion that the mandatory hearing right conferred by RCW 48.04.010 can be withheld by this tribunal on the basis that this tribunal may not be able to "provide final and conclusive" relief to SCH. In addition, while what remedy can be had remains for a decision after the merits of this case are presented and considered, it should be noted that as a practical and legal matter it is likely that this same issue will arise again in a few short months when the Exchange plans are under consideration for renewal.

II. <u>The OIC argues, in addition to his arguments that the issues herein are not justiciable, that SCH's Demand for Hearing is devoid of substantive legal merit.</u>

Finally, the OIC argues that, regardless of the justiciability arguments above, SCH's *Demand for Hearing is devoid of substantive legal merit in any event and is subject to dismissal as a matter of law on this ground as well.* The OIC proposes that *the ACA requires that qualified health plans offer "a **sufficient** choice of providers..." 42 USC Sec. 18031(c)(1)(B) (Emphasis*

supplied.) and that *RCW 48.43.515(1) similarly provides that each enrollee in a health plan must have* **adequate** *choice among health care providers. (Emphasis supplied.) Contrary to* [SCH's] *theory, a "sufficient" or "adequate" choice of providers does not require a carrier to contract with every "essential community provider" nor does it require that every unique medical service that might conceivably be covered be available from a network provider. ... .* Here, the OIC simply quotes a portion of 42 USC Sec. 18031(c)(1) – and none of the significant sections to which it refers – and simply emphasizes that statute's final phrase *except that nothing in this subparagraph shall be* ***construed to require any health plan to provide coverage for any specific medical procedure;*** *(Emphasis supplied.)* The OIC argues *Even though* [SCH] *may serve predominately low-income, medically-underserved individuals and therefore qualify as an "essential community provider," neither it, nor any specialty pediatric medical procedures it may be uniquely qualified to perform, is indispensable to an adequate network. ...* The OIC also argues *The same is true under state law. As noted, the state statutory standard for network adequacy is set out in RCW 48.43.515(1) which requires health plan issuers to provide enrollees an "adequate choice among health care providers." This statute clearly contemplates that every specialty service that may be covered by a plan may not be available from a participating specialty provider.* As with its analysis of the federal law, the OIC emphasizes those portions of the state law which allow carriers some latitude in the event some specialists are not in their networks.

In the argument above, the OIC quotes those portions of some of the applicable statutes and regulations which seem to support its position herein. In addition, the OIC fails to apply them to the facts of this case. Further, the OIC argues that *The object of Washington's network adequacy statutes and rules is to provide enrollees with choice. It is not to give providers monopoly bargaining leverage. These statutes and rules, like their federal counterparts, give no legal right to any provider, no matter how specialized or qualified, to demand inclusion in any carrier's network of contracted providers.* The OIC's Conclusion in its Motion states: [SCH] *in this case seeks to use federal and state network adequacy laws and the OIC hearing process to coerce carriers into entering all or nothing* [sic] *tying contracts with reimbursement rates for routine services dictated by* [SCH] *at levels that far exceed competitive rates. Federal and state network adequacy laws were never intended for such use and cannot be stretched so far.*

It is here concluded that, no matter what the outcome of this proceeding is, it would be error to grant the OIC's Motion to Dismiss based upon this second basis, i.e., that SCH's Demand is "devoid of substantial legal merit." The OIC has recited only portions of some of the applicable federal and state rules - most particularly those which may serve to support its position that these plans' networks are not required to include a critical care pediatric hospital in their networks – and ignores the rest of these complex statutes and regulations. The OIC then supports its argument with various bold assumptions many of which are either unsubstantiated or misconstrue the issue in this proceeding: for example, the OIC asserts that SCH brings this case in order to secure *monopoly bargaining leverage*; that SCH, *no matter how specialized or qualified, ... demand*[s] *inclusion in any carrier's network of contracted providers* and brings this case *to coerce carriers into entering all or nothing* [sic] *tying contracts with reimbursement rates for routine services dictated by* [SCH] and assumes that the rates offered by SCH are *at*

levels that far exceed competitive rates. The OIC presented more of these types of bold, unsubstantiated assertions during oral argument.[4]

CONCLUSION

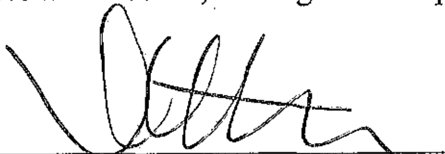
The undersigned has carefully reviewed the arguments and authorities cited by the OIC in the OIC Staff's Motion to Dismiss Demand for Hearing and to Terminate Adjudicative Proceeding filed January 15, 2014; SCH's Opposition to OIC Staff's Motion to Dismiss filed January 29, 2014; and the oral arguments of the parties presented to the undersigned on February 3, 2014. It is hereby concluded that the OIC has failed to establish that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law on the basis that the issues raised in SCH's Demand for Hearing are nonjusticiable under this tribunal's authority as provided in RCW 48.04.010. In addition, it is hereby concluded that the OIC has failed to establish that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law on the issue of whether the OIC complied with federal and state requirements in reviewing and approving the Intervenors' Exchange plan filings. For these reasons, the OIC's Motion to Dismiss must be denied.

ORDER

On the basis of the foregoing activity,

IT IS HEREBY ORDERED that the OIC's Motion to Dismiss filed herein is denied.

THIS ORDER ENTERED AT TUMWATER, WASHINGTON, this 20th day of February, 2014, pursuant to Title 48 RCW and specifically RCW 48.04; Title 34 RCW and specifically RCW 34.05.443; and regulations applicable thereto.



PATRICIA D. PETERSEN, J.D.
Chief Presiding Officer

[4] During oral argument presented February 3, 2014 before the undersigned, counsel for the OIC asserted many other bold assumptions as well, for example: that he has become familiar with doctors over the years and has found that doctors have large egos and therefore it is not surprising that SCH (which includes doctors with presumably large egos) would naturally assert it is better qualified to provide certain services while other doctors and hospitals would also naturally assert that they are better qualified (in an effort to argue that SCH's position that it provides unique and complex services should be discounted as possibly just doctors' egos asserting themselves); and that SCH was bringing this case to obtain more bargaining power with the health carriers (implying that SCH was bringing this case simply to receive more money). During oral argument counsel for the OIC went so far as to promise, on behalf of Premera although Premera was present, that Premera would in fact honor every appropriate request for spot contracts which Premera received.

Declaration of Mailing

I declare under penalty of perjury under the laws of the State of Washington that on the date listed below, I mailed or caused delivery through normal office mailing custom, a true copy of this document to the following people at their addresses listed above: Michael Madden, Esq., Gwendolyn C. Payton, Esq., Timothy J. Parker, Esq., Maren R. Norton, Esq., Mike Kreidler, James T. Odiorne, J.D., CPA, Molly Nollette, AnnaLisa Gellerman, Esq., and Charles Brown, Esq.

DATED this 21st day of February, 2014.

KELLY A. CAIRNS