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STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In re Seattle Children's Hospital's Appeal of OIC's Approvals of HBE Plan Filings	NO. 13-0293 BRIDGESPAN'S REPLY IN SUPPORT OF MOTION TO VACATE CHIEF PRESIDING OFFICER PETERSEN'S ORDERS

I. INTRODUCTION

BridgeSpan Health Company joins in the Reply submitted by Premera Blue Cross. Seattle Children's Hospital ("SCH") acknowledges that there is no obstacle to reconsideration of Judge Petersen's substantive orders but it offers no substantive response regarding the appearance of fairness doctrine. Judge Petersen's orders include rulings on significant issues of standing and justiciability that must be considered by a different judge to remove the taint of bias and re-establish the appearance of fairness in this matter.

II. ANALYSIS

A. Vacation of Judge Petersen's Substantive Orders and Reconsideration of Intervenor's Motion for Summary Judgment and the OIC's Motion to Dismiss Is Necessary to Maintain the Appearance of Fairness.

SCH claims that vacation of Judge Petersen's substantive orders would be "superfluous" and "unnecessary," but fails to address the appearance of bias created by Judge Petersen's whistleblower report and ex parte contacts. This is because even SCH cannot deny that Judge Petersen's orders are tainted by the appearance of partiality.

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020

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> Caesar demanded that his wife should not only be virtuous, but beyond suspicion; and the state should not be any less exacting with its judicial officers, in whose keeping are placed not only the financial interests, but the honor, the liberty, and the lives of its citizens, and it should see to it that the scales in which the rights of the citizen are weighed should be nicely balanced, for, as was well said by Judge Bronson in *People v. Suffolk Common Pleas*, 18 Wend. 550, "next in importance to the duty of rendering a righteous judgment, is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge."

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State ex rel. Beam v. Fulwiler, 76 Wn.2d 313, 456 P.2d 322 (1969) (quoting *State ex rel. Barnard v. Bd. of Educ. of the City of Seattle*, 19 Wash. 8, 17, 52 P. 317 (1898). *See also Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Wash. State Human Rights Comm'n*, 87 Wn.2d 802, 809, 557 P.2d 307 (1976) ("Our system of jurisprudence also demands that in addition to impartiality, disinterestedness, and fairness on the part of the judge, there must be no question or suspicion as to the integrity and fairness of the system."). In short, a "do-over" is necessary to maintain these principles of justice and restore the public's faith in the integrity of these proceedings.

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B. Reconsideration of Intervenors' Motion for Summary Judgment and the OIC's Motion to Dismiss Is Not "Superfluous" as It Could Substantially Alter the Ultimate Outcome.

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SCH misses the threshold issue in arguing that vacation and reconsideration of Judge Petersen's orders is "superfluous" and that BridgeSpan and Premera have failed "to show why a different result is warranted." (Response, p. 2.) Vacation of Judge Petersen's orders under the appearance of fairness doctrine does not require BridgeSpan and Premera to show that a different result is warranted on the merits. Rather, the initial inquiry is whether a disinterested person apprised of the relevant facts would be "reasonably justified in thinking that partiality may exist." *Swift v. Island County*, 87 Wn.2d 348, 361, 552 P.2d 175 (1976); *see also Chicago, Milwaukee*, 87 Wn.2d at 810. As BridgeSpan and Premera established in their opening briefs, the circumstances in this case are such that a disinterested observer would be reasonably justified in thinking that partiality may exist.

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020

1 Furthermore, the Intervenors' Motion for Summary Judgment and the OIC's Motion
2 to Dismiss raised significant issues of law regarding SCH's standing and whether this action
3 is justiciable. A judge unfettered by bias and the appearance of bias could very well
4 determine that SCH does not have standing to bring this action, obviating the need for
5 discovery and a hearing.

6 The potential for this outcome is illustrated by the ruling in a similar network
7 adequacy action in New Hampshire. There, a hospital that failed to contract with a plan sold
8 on the New Hampshire Health Benefit Exchange filed a petition with the New Hampshire
9 Department of Insurance contending that the Exchange plans approved by the New
10 Hampshire Insurance Commissioner were not adequate under state and federal network
11 adequacy standards without the inclusion of the hospital as a network provider. Cunningham
12 Dec., Ex. A. The hospital further claimed that due to a resulting loss of revenue, it was
13 "aggrieved" by the Commissioner's approval of these plans such that it had standing to bring
14 the action underneath New Hampshire law.[1] *Id.* at 5. The New Hampshire Department of
15 Insurance hearings officer determined that the hospital was not "aggrieved," under the
16 meaning of the statute, because the hospital's harm was caused by its failure to contract with
17 the plan, not the Insurance Commissioner's approval of the plan. Cunningham Dec., Ex. B at
18 2 ("the Department...lacked legal authority to grant Petitioner's requested relief, because
19 even if Petitioners could show that Anthem's network was inadequate, ...no law requires that
20 a particular health care provider be included in a particular health carrier's network.").
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25 [1] New Hampshire RSA 400-A:17 is almost identical to RCW 48.04.010(1), and provides that "[t]he commissioner...shall hold a hearing...upon written application for a hearing by a person aggrieved by any act or
26 impending act, or by any report, rule, regulation or order of the commissioner."

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020

III. CONCLUSION

SCH does not deny that Judge Petersen's orders are subjection to reconsideration. The appearance of fairness requires the vacation and reconsideration of Judge Petersen's substantive orders, particularly in light of the public and legislative concern regarding her decision-making process. The public's faith in the integrity of these proceedings can be restored only if the decisions in this matter are made by a judge not tainted by the appearance of partiality.

DATED this 23rd day of June, 2014.

CARNEY BADLEY SPELLMAN, P.S.

By ______________________
Timothy J. Parker, WSBA #8797
Jason W. Anderson, WSBA #30512
Melissa J. Cunningham, WSBA #46537
Attorneys for BridgeSpan Health Company

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020

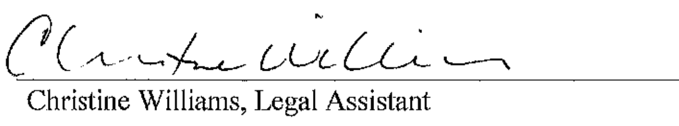
CERTIFICATE OF SERVICE

I, Christine Williams, under oath hereby declare as follows: I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, and not a party to nor interested in this action. On June 23, 2014, I caused to be delivered via ***e-mail and U.S. mail*** a copy of the foregoing document on the following parties at the last known address as stated:

OIC Hearings Unit – **ORIGINAL** Office of the Insurance Commissioner 5000 Capitol Boulevard Tumwater, WA 98501 Email: kellyc@oic.wa.gov Hon. George Finkle (Ret.) Email: gfinkle@jdrllc.com forbes@jdrllc.com	Attorney for Seattle Children's Hospital Michael Madden Carol Sue Janes Bennett Bigelow & Leedom, P.S. 601 Union Street, Suite 1500 Seattle, WA 98101 Email: mmadden@bbllaw.com cjanes@bbllaw.com
Attorney for OIC Marta U. DeLeon Office of the Attorney General P.O. Box 40100 Olympia, WA 98504-0100 Email: martad@atg.wa.gov	Attorney for Premera Blue Cross Gwendolyn C. Payton Lane Powell PC 1420 Fifth Avenue, Suite 4100 Seattle, WA 98101-2338 Email: paytong@lanepowell.com
Deputy Insurance Commissioner for Legal Affairs AnnaLisa Gellermann Deputy Insurance Commissioner for Legal Affairs Office of the Insurance Commissioner P.O. Box 40255 Olympia, WA 98504-0255 Email: annalisag@oic.wa.gov	Legal Affairs Division Charles Brown Legal Affairs Division Office of the Insurance Commissioner P.O. Box 40255 Olympia, WA 98504-0255 Email: charlesb@oic.wa.gov

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 23rd day of June, 2014, at Seattle, Washington.



Christine Williams, Legal Assistant

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STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In re Seattle Children's Hospital's Appeal of OIC's Approvals of HBE Plan Filings	NO. 13-0293 DECLARATION OF MELISSA J. CUNNINGHAM IN SUPPORT BRIDGESPAN'S REPLY IN SUPPORT OF MOTION TO VACATE CHIEF PRESIDING OFFICER PETERSEN'S ORDERS

I, Melissa J. Cunningham, declare as follows:

1. I am an attorney for BridgeSpan Health Company. I make this declaration on personal knowledge in support of BridgeSpan Health Company's Reply in Support of Motion to Vacate Chief Presiding Officer Petersen's Orders.

2. Attached hereto as Exhibit A is a true and correct copy of *Frisbie Memorial Hospital, et. al.*, No. 12-038-AR New Hampshire Insurance Department, (December 11, 2013) (Order on Petition Issued), accessible at http://www.nh.gov/insurance/legal/nhid_legal_frisbie.htm.

3. Attached hereto as Exhibit B is a true and correct copy of *Petition of Margaret McCarthy*, No. 12-038-AR New Hampshire Insurance Department (March 28, 2014)(Order and Notice of Hearing), accessible at http://www.nh.gov/insurance/legal/nhid_legal_frisbie.htm.

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020

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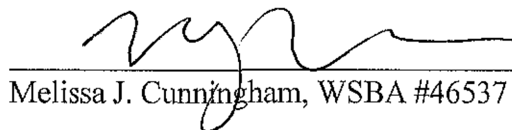
I DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 23rd day of June, 2014.



Melissa J. Cunningham, WSBA #46537

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020

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CERTIFICATE OF SERVICE

2 I, Christine Williams, under oath hereby declare as follows: I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, and not a party to nor interested in this action. On
3 June 23, 2014, I caused to be delivered via ***e-mail and U.S. mail*** a copy of the foregoing document on the following parties at the last known address as stated:

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OIC Hearings Unit – **ORIGINAL** Office of the Insurance Commissioner 5000 Capitol Boulevard Tumwater, WA 98501 Email: kellyc@oic.wa.gov Hon. George Finkle (Ret.) Email: gfinkle@jdrllc.com forbes@jdrllc.com	Attorney for Seattle Children's Hospital Michael Madden Carol Sue Janes Bennett Bigelow & Leedom, P.S. 601 Union Street, Suite 1500 Seattle, WA 98101 Email: mmadden@bbllaw.com cjanes@bbllaw.com
Attorney for OIC Marta U. DeLeon Office of the Attorney General P.O. Box 40100 Olympia, WA 98504-0100 Email: martad@atg.wa.gov	Attorney for Premera Blue Cross Gwendolyn C. Payton Lane Powell PC 1420 Fifth Avenue, Suite 4100 Seattle, WA 98101-2338 Email: paytong@lanepowell.com
Deputy Insurance Commissioner for Legal Affairs AnnaLisa Gellermann Deputy Insurance Commissioner for Legal Affairs Office of the Insurance Commissioner P.O. Box 40255 Olympia, WA 98504-0255 Email: annalisag@oic.wa.gov	Legal Affairs Division Charles Brown Legal Affairs Division Office of the Insurance Commissioner P.O. Box 40255 Olympia, WA 98504-0255 Email: charlesb@oic.wa.gov

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE
20 STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

21 DATED this 23rd day of June, 2014, at Seattle, Washington.

22

23 [signature]
Christine Williams, Legal Assistant

24 25 26

EXHIBIT A

STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT

In Re: Frisbie Memorial Hospital, et al.

INS No. 13-038-AR

Order

Procedural History

On November 6, 2013, Frisbie Memorial Hospital and Margaret McCarthy ("Petitioners") filed a Petition for Hearing Pursuant to RSA 400-A:17 ("Petition") with the New Hampshire Insurance Department ("Department"). The Petition relates to the Department's July 31, 2013 recommendation that the federal Centers for Medicare and Medicaid Services ("CMS") certify certain health insurance plans being offered by Anthem Blue Cross and Blue Shield of New Hampshire ("Anthem") as Qualified Health Plans to be sold on the Health Insurance Marketplace ("Marketplace") being operated by the federal government on behalf of New Hampshire pursuant to the federal Affordable Care Act ("ACA").

Petitioners' central complaint is that Anthem did not include Petitioner Frisbie Memorial Hospital ("Petitioner Frisbie") in the health care provider network for its Marketplace plans. Petitioners assert that, based on this exclusion, they are entitled to an adjudicative hearing before the Department as "persons aggrieved" under RSA 400-A:17. Petitioner Frisbie claims that it will lose revenue and be at a competitive disadvantage as compared to other medical providers because it is not part of Anthem's Marketplace network, while Petitioner McCarthy alleges that she will have to change medical providers if she chooses to purchase Anthem coverage through the Marketplace. As relief, the Petition asks that the Department (a) schedule a hearing on whether Anthem's Marketplace plans meet state and federal network adequacy standards; and (b) order Anthem to include Petitioner Frisbie in the provider network for its Marketplace plans.

On November 14, 2013, the Department asked Petitioners to submit further information and argument in support of their assertion that each qualifies as a "person aggrieved" within the meaning of RSA 400-A:17, II for purposes of seeking an adjudicative hearing on the Department's decision to recommend approval of Anthem's Marketplace plans. The Department also offered Anthem the opportunity to submit arguments on Petitioners' standing.

The Department noted that in the event it found neither Petitioner had standing to request an adjudicative hearing under RSA 400-A:17, II as a "person aggrieved," it would nevertheless schedule a discretionary public hearing under RSA 400-A:17, I on New Hampshire's regulatory

standards and procedures for determining network adequacy and the balance between promoting access to care and controlling costs.

On December 2, 2013, Petitioners submitted arguments and affidavits in support of their claim of standing, and Anthem submitted a brief on the issue. Petitioners submitted a reply brief on December 6, 2013, and Anthem submitted a supplemental brief on December 11, 2013.

Findings and Analysis

As laid out in detail below, after reviewing the Petition, along with the briefs and affidavits submitted, I conclude that neither Petitioner is "a person aggrieved by any act or impending act . . . of the commissioner" within the meaning of RSA 400-A:17, II(b). Therefore, I am not required to conduct an adjudicative hearing in response to the Petition.

I. Adjudicative Hearing Requirements

RSA 400-A:17 provides that:

> I. The commissioner may hold hearings for any purpose within the scope of [the Insurance Code] as he may deem advisable.
> II. He shall hold a hearing:
> (a) if required by any provision of this title,
> (b) or upon written application for a hearing by a person aggrieved by any act or impending act, or by any report, rule, regulation, or order of the commissioner (other than an order for the holding of a hearing, or order on a hearing, or pursuant to such order, of which hearing such person had notice).
> III. Any such application must be filed with the commissioner within 30 days after such person knew or reasonably should have known of such act, impending act, failure, report, rule, regulation, or order, unless a different period is provided for by other applicable law, and in which case such other law shall govern. The application shall briefly state the respects in which the applicant is so aggrieved, together with the ground to be relied upon for the relief to be demanded at the hearing. The commissioner may require that the application be signed and sworn to by a person competent to be a witness in civil courts.
> IV. If the commissioner finds that the application is timely, made in good faith, and that the applicant would be so aggrieved if his grounds are established he shall hold a hearing within 30 days after the filing of the application, or within 30 days after the application has been sworn to, whichever is the later date, unless in either case the hearing is postponed by mutual consent.
> V. Failure to hold the hearing upon application therefor of a person entitled thereto as hereinabove provided shall constitute a denial of the relief sought, and shall be the equivalent of a final order of the commissioner on hearing for the purpose of an appeal under RSA 400-A:24.
> VI. Pending the hearing and decision thereon, the commissioner may suspend or postpone the effective date of his previous action.

Under RSA 400-A:17, holding a hearing is mandatory, as opposed to discretionary, in two situations. First, the commissioner must hold a hearing if a hearing is required under any provision of the Insurance Code. RSA 400-A:17, II(a). Petitioners do not cite any provision of the Insurance Code as requiring the hearing they seek, so paragraph II(a) is not applicable. Second, the commissioner must hold a hearing "upon written application for a hearing by a **person aggrieved by any act or impending act,** or by any report, rule, regulation, or order of the commissioner." RSA 400-A:17, II(b). Petitioners are proceeding under this provision.

Specifically, Petitioners assert that they are aggrieved by the Department's recommendation to the federal Center for Consumer Information and Insurance Oversight ("CCIIO"), a division of CMS, that Anthem's proposed Marketplace plans, whose provider network does not include Petitioner Frisbie, be approved for sale as Qualified Health Plans ("QHPs") on the federal Marketplace.

The central question is whether, as a matter both of fact and law, one or both Petitioners were "aggrieved" by the Department's recommendation to CCIIO, which the Department agrees was an act of the commissioner within the meaning of RSA 400-A:17, II(b). Answering this question requires an understanding of the nature and legal basis of the Department's recommendation, the nature of each Petitioner's alleged injury, and the relationship between the alleged injury, the requested relief, and the Department's recommendation.

II. <u>The Department's QHP Recommendation</u>

Under the ACA, starting in October 2013, consumers in each state must have access to a Health Insurance Exchange or Marketplace, a website consumers can use, among other things, to purchase health insurance from private insurance carriers. In New Hampshire, the Marketplace is operated by the federal government under a partnership arrangement between the state and CCIIO. The Insurance Commissioner retains his traditional authority to regulate insurance companies and policies to the maximum extent permissible under federal law. <u>See generally</u> RSA chapter 420-N.

On April 10, 2013, the Department issued Bulletin No. INS 13-007-AB ("Bulletin"), which laid out for insurance carriers the legal standards and timeframes for gaining approval to sell plans on the Marketplace for the 2014 plan year.[1] As explained in the Bulletin, the Department's role with respect to Marketplace plans was to review all plans submitted for conformity with both state and federal statutory requirements and standards, then make a recommendation to CCIIO as to whether each plan should be certified by the federal agency as a QHP for sale on the Marketplace. Bulletin at 1.

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[1] A copy of the Bulletin is attached as Exhibit 1 to the Petition, and a link is available here: http://www.nh.gov/insurance/media/bulletins/2013/documents/ins_13_007_ab.pdf

The Bulletin established timelines and procedures for the submission of proposed QHPs. Specifically, June 1, 2013 was the deadline for carriers to submit plans to the Department using the SERFF electronic filing system, and July 31, 2013 was the Department's deadline, established by CCIIO, to submit its recommendations, again through the SERFF system, to the federal agency. Bulletin at 2. In August of 2013, CCIIO would give carriers the opportunity to address any data errors, and in early September of 2013, CCIIO would make a final decision on whether to certify each plan for sale on the Marketplace. Bulletin at 3. On October 1, 2013, the Marketplace would be open to the public for enrollment, and all plan details would be available for the public to view. Bulletin at 3.

The Bulletin also articulated the legal standards, both state and federal, that the Department would apply in its plan review. With respect to network adequacy, the Bulletin stated that this review was governed by RSA chapter 420-J and Ins Part 2701, as well as the federal standards contained in Section 2702(c) of the Public Health Services Act and 45 C.F.R. 156.230 and 156.235. Bulletin at 1-2, 4-5. As laid out in the Bulletin, the Department's review of network adequacy for proposed QHPs is conducted by an examiner in the context of a form filing review. In addition, the Department is authorized to take enforcement action after QHP approval if network adequacy standards are violated. RSA 420-J:14, cited in Bulletin at 1; see also Ins 2701.10.

On July 31, 2013 the Department submitted its QHP recommendations to CCIIO, and on August 1, 2013 the Department issued a press release indicating that the plan recommendations had been made.[2] Under Ins 4101.05(h), the plan rates and details would not become public until October 1, 2013, when the Marketplace opened for business. While the Department could not release any plan details prior to October 1, it became public knowledge in September 2013 that Anthem would be the only insurance carrier offering health plans on the Marketplace in 2014, and that these plans would use a provider network that did not include all 26 New Hampshire hospitals.[3]

III. Applicable Network Adequacy Standards

RSA 420-J:7, the primary network adequacy standard for New Hampshire, requires that "[a] health carrier shall maintain a network that is sufficient in numbers, types, and geographic location of providers to ensure that all services to covered persons will be accessible without unreasonable delay." In addition, under the specific language of the Bulletin, all QHP issuers were required (1) to comply with Ins Part 2701 by filing a network adequacy report with the Department, (2) to submit an attestation that the network includes "essential community providers" as designated by CCIIO in the manner specified by federal regulations, and (3) to make their provider directories available for publication online. Bulletin at 4-5.

[2] A copy of the press release is attached as Exhibit 2 to the Petition, and a link is available here: http://www.nh.gov/insurance/media/pr/2013/documents/pr_080113.pdf.

[3] See, e.g., Anthem Defends New Health Plans, New Hampshire Union Leader, September 18, 2013, link at http://www.unionleader.com/article/20130918/NEWS12/130919231/0/SEARCH.

The network adequacy standards do not require that a carrier contract with any particular provider, or that any particular enrolled participant have access to any particular provider. Rather, the standards are framed to ensure reasonable access (defined in terms of miles or driving time) to the vast majority (typically 90%) of enrolled participants. See Ins 2701.06, Standards for Geographic Accessibility. Consistent with the language of RSA 420-N:7, the rules' Basic Access Requirement provides that:

> (a) Each health carrier offering a managed care plan shall maintain a network of primary care providers, specialists, institutional providers, and other ancillary health care personnel that is sufficient in numbers, types and geographic location of providers to ensure that all covered health care services are accessible to covered persons without unreasonable delay.
>
> (b) A health carrier's network of participating providers shall be considered sufficient to meet the basic access requirement in Ins 2701.04(a) if it meets all of the standards contained in Ins 2701.02 through 2701.09.

Ins 2701.04(a) and (b).

Consistent with these regulatory standards, the Department would have legal grounds to disapprove the adequacy of Anthem's network only if that network did not meet the requirements of Ins Part 2701, or the specific federal law requirements that are laid out in the Bulletin. Petitioners do not allege that Anthem's network does not meet these standards; rather, their claims focus on the fact that Anthem did not include a specific provider, Petitioner Frisbie, in the provider network for its Marketplace plans.

IV. Petitioners' Alleged Aggrievement

Petitioner Frisbie alleges that it "is aggrieved by the Department's approval of the Anthem QHPs because it has been excluded, without notice or an opportunity to participate, in the networks available under Anthem's QHPs." Petition, paragraph 16. In its affidavit and brief on standing, Petitioner Frisbie provides more detail, asserting that Anthem did not initiate negotiations with it with regard to inclusion in the Marketplace plan network, despite the fact that "Frisbie and its employed physicians have been part of Anthem's network of approved providers for many years . . ." Proof of Standing, paragraph 7. Petitioner Frisbie also complains that Anthem included its competitor Wentworth Douglas Hospital in the Marketplace network, which action has allegedly "materially impaired Frisbie's ability to compete for patients in its service area." Proof of Standing, paragraph 8.

Petitioner Margaret McCarthy alleges that she is aggrieved because she is "required to give up health care providers associated with Frisbie in order to obtain insurance on the Marketplace." Petition, paragraph 16. Petitioner McCarthy asserts that she is a current Anthem policyholder whose current policy permits her to access Frisbie providers, but who will not be able to renew her policy when its term ends in 2014. Proof of Standing, paragraph 11. Moreover, Petitioner

McCarthy alleges, she will not be able to access subsidies through the Marketplace if she wishes to remain with her Frisbie providers. Id. Petitioners reiterate, but do not add to, these allegations in their reply brief filed December 6, 2013.[4]

V. Legal Standard for Aggrievement

To have standing to appeal an administrative agency's decision "a party must demonstrate that its rights 'may be directly affected by the decision, or in other words, that [it] has suffered or will suffer an injury in fact.'" In re. Union Telephone Co., 160 N.H. 309, 313 (2010), quoting Appeal of Richards, 134 N.H. 148, 154 (1991). The inquiry into whether Petitioners are "aggrieved" is similar to that required in the federal courts to establish Article III standing. There, the alleged injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." Monsanto Co. v. Geertson Seed Farms, 561 U.S. ——, ——, 130 S.Ct. 2743, 2752 (2010); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992).

To prove "injury in fact," a person must show first that the action being challenged has or will have a direct effect on the person's legally protected interest. A person may have a legally-protected interest for purposes of some decisions, but not others. In the administrative context, the New Hampshire Supreme Court has granted standing to consumers to appeal rate-setting decisions by the Public Utilities Commission. Appeal of Richards, 134 N.H. 148 (1991). However, the Court denied standing to appeal Commission decisions that do not directly impact ratepayers, even where the decision may lead to rate increases in the future. Appeal of Campaign for Ratepayers Rights, 142 N.H. 629 (1998).

The standing analysis focuses not on the claimed severity of the alleged injury, but on the degree to which the injury is connected to the decision being challenged. Even where there is an allegation of serious harm or economic disadvantage, the Court has not found standing where there is no direct link between the challenged action and the alleged harm. See Avery v. N.H. Dept of Education, 162 N.H. 604 (2011)(abutting property owners lacked standing to challenge school lot size waiver granted by state Department of Education, despite allegation of reduction of property value, because alleged harm not sufficiently connected to purpose of waiver process); Nautilus of Exeter v. Town of Exeter, 139 N.H. 450 (1995)(denying standing to pursue zoning appeal based solely on increased competition from construction of similar facility in same town). Without a direct relationship between the decision and a party's legal right, there is no injury in fact. Appeal of Richards, 134 N.H. 148 (1991).

Similarly, a person cannot be found to be "aggrieved" where reversal of the challenged decision will not correct the alleged harm. Significantly, the cases Petitioners cite in which increased or unfair competition was found to confer standing to pursue an administrative appeal involved

[4] Both of Anthem's briefs and Petitioners' reply brief also address the issue of the timeliness of the Petition. Because the Department finds that petitioners lack standing, this order does not address the issue of timeliness.

decisions by regulatory agencies that favored one regulated entity over another. Union Telephone, 160 N.H. 309 (2010)(competing telephone companies regulated by Public Utilities Commission); N.H. Bankers Ass'n v. Nelson, 113 N.H. 127 (1973)(competing banks regulated by the banking commissioner). In those cases, an erroneous or procedurally unfair decision by an agency could be corrected following a reversal on appeal, because the agency had authority to regulate all of the competitors in question. By contrast, when the effect complained of is beyond the scope of the regulatory system, even a successful appeal will not redress the alleged harm.

In sum, in order to establish that they are "aggrieved" within the meaning of RSA 400-A:17, II(b), each Petitioner must demonstrate that they have a right or a legally protected interest, that the Department's action caused a direct injury to that right, and that the Department has authority to grant the relief they request.

VI. Analysis of Petitioners' Standing

Neither Petitioner qualifies as an "aggrieved person" under RSA 400-A:17, II(b). Petitioners' allegations with regard to standing focus entirely on the alleged harm they will suffer as a result of Anthem's decision to exclude Petitioner Frisbie from its Marketplace network. They are silent, however, on the connection between the Department's decision and that alleged harm; they do not assert that the Department's decision to approve Anthem's network violated any legal standard;[5] and they put forth no argument as to how a favorable decision would make them whole.

Even if the Department's network adequacy review violated the Insurance Code in some substantive respect (which Petitioners do not allege, other than their allegation that the Department did not conduct a hearing, which the Code does not require), the Department has no authority to order Anthem to contract with any particular provider. The agency action Petitioners challenge is the Department's determination, in the context of its recommendation to CCIIO that the Anthem plans be certified as QHPs, that Anthem's network met applicable network adequacy standards. These standards do not require that Anthem contract with any particular provider, or that any particular enrolled member have access to any particular provider. Even if Petitioners could prove Anthem's network was inadequate under those standards, the only remedy within the Department's authority would be to order Anthem to address any deficiencies by contracting with additional providers. These additional providers would not necessarily include Petitioner Frisbie.

Central to Petitioner Frisbie's claim of standing is the assertion that the Department's action will place it at a competitive disadvantage relative to other providers that were included in Anthem's

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[5] Petitioner's only allegations that the Department's action was unlawful relate to the fact that it lacked a process for public input. Petitioners cite no authority requiring such input, other than a generalized constitutional due process claim. Without standing, Petitioners cannot rely on a constitutional due process claim. See Appeal of Richards, 134 N.H. 148, 154 (1991)(" . . . a party has standing to raise a constitutional issue only when his own personal rights have been or will be directly and specifically affected.").

Marketplace network. This allegation is not compelling, given that the Department does not regulate competition between medical providers. As discussed above, the cases Petitioner Frisbie cites on the issue of competitive disadvantage involved competitors within a regulated industry that were being placed at a disadvantage by a decision of their regulator. Union Telephone, 160 N.H. 309; Bankers Ass'n v. Nelson, 113 N.H. 127. Even if Petitioner Frisbie's allegations are true, being subject to increased competition, without a direct injury to a legal right, is not enough to confer standing. Nautilus of Exeter v. Town of Exeter, 139 N.H. 450.

Petitioner McCarthy claims that, as a consumer, she will be disadvantaged because she must choose between purchasing a subsidized policy through the Marketplace, and keeping her present medical providers, who are not in Anthem's network. This alleged harm, like Petitioner Frisbie's claim of competitive disadvantage, is beyond the purview of the Department's regulatory authority. If Petitioner McCarthy claimed that Anthem were violating the terms of its insurance contract, the Department would have authority to act. However, she makes no such allegation, and she cites no legal basis for her claimed right to have a particular insurance carrier include a particular medical provider in its network.

The harms Petitioners complain of are related to Anthem's decision not to contract with Petitioner Frisbie; they were not caused by the Department's determination that Anthem's network met applicable network adequacy standards. In a very recent decision, the federal District Court for Connecticut found that medical providers had standing to challenge a health insurance carrier's decision to exclude thousands of medical providers from its Medicare provider network, and issued an injunction against the insurer. Fairfield County Medical Ass'n v. United Healthcare of New England, U.S. Dist. Ct. (Conn.) No. 3:13-cv-1621, December 5, 2013 (Ruling and Order Granting Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction). That case was brought against the health insurer directly, not against a regulatory agency.

In sum, both Petitioners lack standing because they have alleged no harm that a decision of the Department could remedy.[6] There is no legal authority that would allow the Department to grant their requested relief of ordering Anthem to contract with Petitioner Frisbie. It would serve no purpose, and waste both agency and judicial resources, to allow an appeal of an agency decision when the agency does not have the power to grant the requested relief.

Public Hearing under RSA 400-A:17, I

In view of general public concern about Anthem's Marketplace network, I find that it would be in the public interest for the Department to hold a public informational hearing pursuant to RSA 400-A:17, I about New Hampshire's regulatory standards and procedures for determining network adequacy and the balance between promoting access to care and controlling costs. The

[6] Because Petitioners' allegations with regard to standing fail as a matter of law, it is not necessary for the Department to make factual findings on this issue, and nothing in this order should be construed as a factual finding.

Department will issue separate public notice of the hearing, which it anticipates will be scheduled for January 2014.[7] All interested members of the public, including Petitioners will be welcome to attend and offer testimony. Because the hearing is not an adjudicative one, the requirements of RSA 400-A:17, II-V with respect to the scheduling of adjudicative hearings do not apply.

Order

In view of the analysis above, I find that neither Petitioner is an "aggrieved person" within the meaning of RSA 400-A:17, II(b), and that the Department is not required by law to hold an adjudicative hearing on the Petition. For purposes of any appeal Petitioners may wish to file under RSA 400-A:24, this decision is my final order on the Petition.

SO ORDERED.

NEW HAMPSHIRE INSURANCE DEPARTMENT

Date: 12-11-13

Roger A. Sevigny, Insurance Commissioner

[7] As noted in recent correspondence between counsel, the Department is still in the process of responding to the Right-to-Know request Petitioners filed at the time they filed the Petition. Although the documents associated with the Department's network adequacy review are non-public under RSA 420-J:11, I anticipate that, after consultation with Anthem, I may choose in my discretion under RSA 420-J:11 to make some or all of these documents public prior to the hearing. The scheduling of the public hearing will allow this review and any potential release of documents to take place in advance of the public hearing.

EXHIBIT B

State of New Hampshire
Insurance Department

In Re: Petition of Margaret McCarthy

Docket No. Ins. 13-038-AR

ORDER
AND NOTICE OF HEARING

Procedural History

On November 6, 2013, Frisbie Memorial Hospital and Margaret McCarthy ("Petitioners") filed a Petition for Hearing Pursuant to RSA 400-A:17 ("Petition") with the New Hampshire Insurance Department ("Department"). The Petition relates to the Department's July 31, 2013 recommendation that the federal Centers for Medicare and Medicaid Services ("CMS") certify certain health insurance plans being offered by Anthem Blue Cross and Blue Shield of New Hampshire ("Anthem") as Qualified Health Plans to be sold on the Health Insurance Marketplace ("Marketplace") being operated by the federal government on behalf of New Hampshire pursuant to the federal Affordable Care Act ("ACA").

As grounds for its hearing request under RSA 400-A:17,[1] Petitioner Frisbie Memorial Hospital ("Petitioner Frisbie"), which was not offered the opportunity to participate in Anthem's Marketplace network, claimed that it will lose revenue and be at a competitive disadvantage as compared to other medical providers because it is not part of the network. Petitioner Margaret McCarthy ("Petitioner McCarthy"), a patient of Petitioner Frisbie, alleged that she would have to change medical providers if she chose to purchase Anthem coverage through the Marketplace, which is the only way she can obtain federal tax subsidies to help her afford insurance.[2] As relief, the Petition asked that the Department (a) schedule a hearing on whether Anthem's Marketplace plans meet state and federal network adequacy standards; and (b) order Anthem to include Petitioner Frisbie in the provider network for its Marketplace plans.

[1] A "person aggrieved" by a decision of the Insurance Commissioner may request a hearing on that decision under RSA 400-A:17, II(b). The hearing request "must be filed with the commissioner within 30 days after such person knew or reasonably should have known of such act," and must "briefly state the respects in which the applicant is so aggrieved, together with the ground to be relied upon for the relief to be demanded at the hearing." RSA 400-A:17, III.
[2] In an affidavit submitted December 2, 2013, Petitioner McCarthy stated that her current annual income level would qualify her for a subsidy of $2,897 on the Marketplace.

On December 11, 2013, following briefing by Petitioners and Anthem on the issue of standing, the Department ruled that neither Petitioner qualified as a "person aggrieved" under RSA 400-A:17, II(b) and that neither was entitled to an adjudicative hearing challenging the Department's recommendation to CMS. As additional grounds for denying standing to Petitioners, the Department noted that it lacked legal authority to grant Petitioners' requested relief, even if Petitioners could show that Anthem's network was inadequate, because no law requires that a particular health care provider be included in a particular health carrier's provider network.

Petitioners requested rehearing, asserting for the first time that Anthem's plans cannot meet network adequacy standards unless they include Petitioner Frisbie in their provider network. On January 17, 2014 the Department granted Petitioners' request for reconsideration, suspending its December 11 order. Specifically, the Department allowed Petitioners to submit additional pleadings and affidavits on the issue of standing, in light of extensive records relating to the Department's network adequacy review that were provided to Petitioners on January 14, 2014. In addition, on February 10, 2014, the Department held a four-hour non-adjudicative public hearing on network adequacy. Along with many other members of the public, Petitioner McCarthy made comments, and representatives of Petitioner Frisbie were afforded the opportunity to make a lengthy presentation, including a detailed slide show.

Petitioners filed their Supplemental Filing Concerning Standing on February 18, 2014, and on March 12, 2014, Anthem filed its Second Supplemental Brief on Aggrievement. On March 19, 2014, Petitioners indicated that they would not be filing a response to Anthem's Second Supplemental Brief.

Supplemental Assertions

In their Supplemental Filing, Petitioners make detailed arguments about the alleged inadequacies of Anthem's network, contending that the network cannot be found adequate under Marketplace standards without the inclusion of Petitioner Frisbie. Other than this, Petitioners make no new assertions with respect to Petitioner Frisbie's standing, relying instead on their previous argument that exclusion from the network has caused it economic injury. Petitioner McCarthy's allegations on standing are also largely unchanged. She asserts that because her health care providers are associated with Petitioner Frisbie, she has been injured in that she must either switch medical providers, or accept higher costs for insurance, because she will be unable to obtain the federal subsidies for which she would qualify if she purchased a Marketplace plan.

Anthem's Supplemental Brief urges the Department to affirm its December 11 order, arguing that the Department's recommendation to CMS has not caused either Petitioner

an "injury in fact" as required to establish standing under RSA 400-A:17. Anthem asserts that Petitioner McCarthy cannot have standing because, as attested by an affidavit submitted by Anthem, she remains on her 2013 health insurance plan, which includes her current medical providers. Thus, Anthem argues, she has not been forced to make a choice between switching providers and purchasing a Marketplace plan. Anthem also asserts that Petitioners' claims are time-barred, as Petitioner Frisbie knew it would not be included in Anthem's network even before the Department made its recommendation to CMS, yet made no attempt to challenge the Department's action until months later.

Findings and Analysis

After reviewing Petitioners' and Anthem's supplemental filings, I affirm my December 11, 2013 conclusion that Petitioner Frisbie is not "a person aggrieved by any act or impending act . . . of the commissioner" within the meaning of RSA 400-A:17, II(b). However, as discussed further below, I reverse my conclusion that Petitioner McCarthy lacks standing. Therefore, I am scheduling an adjudicative hearing to consider her contention that the Anthem plans cannot meet network adequacy standards without the inclusion of Petitioner Frisbie.

Except as noted below, the findings of my December 11 order are affirmed, readopted, and incorporated herein by reference. Specifically, I reaffirm my prior findings with respect to adjudicative hearing requirements under RSA 400-A:17, the nature and legal basis of the Department's recommendation of Marketplace plans to CMS, applicable network adequacy standards under RSA 420-J:7 and Ins Part 2701, and the legal standard for aggrieved party status.

In particular, I reaffirm my prior finding that the network adequacy standards do not require that an insurance carrier contract with any particular medical provider, or that any particular enrolled participant have access to any particular provider. Rather, the standards are framed to ensure reasonable access (defined in terms of miles or driving time) to the vast majority (typically 90%) of enrolled participants. See Ins 2701.06, Standards for Geographic Accessibility.

I also specifically reaffirm my finding that, to prove "injury in fact" in the context of an administrative appeal, a person must show that the action being challenged has or will have a direct effect on the person's legally protected interest. In re. Union Telephone Co., 160 N.H. 309, 313 (2010); Appeal of Campaign for Ratepayers Rights, 142 N.H. 629 (1998); Appeal of Richards, 134 N.H. 148 (1991).

I. Petitioner Frisbie's Claim of Standing

Petitioner Frisbie alleges that it is aggrieved by the Department's recommendation to CMS "because it has been excluded, without notice or an opportunity to participate, in [Anthem's] networks." Petition, paragraph 16. In its affidavit and brief on standing, Petitioner Frisbie provides more detail, asserting that Anthem did not initiate negotiations with it with regard to inclusion in the Marketplace plan network, despite the fact that "Frisbie and its employed physicians have been part of Anthem's network of approved providers for many years . . ." Proof of Standing, paragraph 7. Petitioner Frisbie also complains that Anthem included its competitor Wentworth Douglas Hospital in the Marketplace network, which action has allegedly "materially impaired Frisbie's ability to compete for patients in its service area." Proof of Standing, paragraph 8. Petitioner Frisbie does not add to these allegations in its supplemental filing on standing.

In my December 11 order, I found that Petitioner Frisbie lacked standing because its complaint of competitive disadvantage made to an authority that does not regulate hospitals, is insufficient to show injury in fact. Even if Petitioner Frisbie's allegations are true, being subject to increased competition, without a direct injury to a legal right, is not enough to confer standing. Nautilus of Exeter v. Town of Exeter, 139 N.H. 450 (1995). As I noted in the December 11 order, the cases Petitioner Frisbie cites in which increased or unfair competition was found to confer standing to pursue an administrative appeal involved decisions by regulatory agencies that favored one closely regulated entity over another. Union Telephone, 160 N.H. 309 (2010)(competing telephone companies regulated by Public Utilities Commission); N.H. Bankers Ass'n v. Nelson, 113 N.H. 127 (1973)(competing banks regulated by the banking commissioner). The Insurance Department regulates insurance carriers like Anthem, not medical providers like Petitioner Frisbie. A carrier's decision not to contract with a particular medical provider is not subject to review by the Department, and the Department has no authority to regulate competition between medical providers. Therefore, my decision that Petitioner Frisbie is not an "aggrieved person" remains unchanged.[3]

II. Petitioner McCarthy's Claim of Standing

Petitioner Margaret McCarthy alleges that she has standing because she is "required to give up health care providers associated with Frisbie in order to obtain insurance on the Marketplace." Petition, paragraph 16. Petitioner McCarthy asserts that she is a current

[3]As in my December 11 order, because I find that Petitioner Frisbie lacks standing, there is no need to address Anthem's argument that the Petition was untimely. Anthem's arguments about untimeliness relate only to Petitioner Frisbie, not to Petitioner McCarthy.

Anthem policyholder whose current policy permits her to access Frisbie providers, but who will not be able to renew her policy when its term ends in 2014. Proof of Standing, paragraph 11. Moreover, Petitioner McCarthy alleges, she will not be able to access subsidies through the Marketplace if she wishes to remain with her Frisbie providers. Id.

Petitioners' supplemental filing reiterates the claims in the Petition regarding Petitioner McCarthy's standing. However, it also provides additional context that convinces me that Petitioner McCarthy does have standing. As Petitioners assert, passage of the ACA makes a difference with respect to policyholders' interest in the adequacy of Anthem's network. The ACA requires most U.S. residents to have health insurance, and provides substantial subsidies to help those who income-qualify to purchase Marketplace plans.

Anthem is the only carrier who chose to offer Marketplace plans in New Hampshire during 2014, and the federal subsidies under the ACA are available only to consumers who purchase Marketplace plans. If Anthem's network were demonstrated to be inadequate, the "injury" of being forced to choose between a subsidized plan with an inadequate network, and a more expensive plan with an adequate network, would be sufficient to show standing.

Petitioner McCarthy has attested that she qualifies for a subsidy, which she would have received beginning in January 2014 if she had chosen to enroll in a Marketplace plan. She also alleges that the network for Anthem's Marketplace plans is inadequate. Thus, she has already had to forego the subsidy for which she is eligible in order to keep her medical providers. Taking as true (for purposes of the standing analysis only) her allegation that Anthem's network is inadequate and can only be made adequate by the inclusion of Frisbie, this is a sufficiently direct injury to confer standing under RSA 400-A:17, II(b).

Anthem has argued that Petitioner McCarthy does not have standing because she remains, for now, in her 2013 broad-network coverage. I am not persuaded by this argument. The injury Petitioner McCarthy claims to have suffered has already occurred, and continues each month that she foregoes the federal subsidy.

In view of all the circumstances, and in particular the provisions of the ACA, I conclude that Petitioner McCarthy has standing under RSA 400-A:17 as a consumer who claims to have been harmed by the circumstance that there is only one Marketplace provider and that this provider has an inadequate network which can only be made adequate by the inclusion of Frisbie. Therefore, she is entitled to an adjudicative hearing regarding the Department's approval of that network.

My decision that Petitioner McCarthy has standing rests on the fact that Anthem is the only carrier offering plans in the Marketplace, and that buying a Marketplace plan is the only way to access federal subsidies. The prospect of paying higher premiums for an

insurance plan with a broader network would not, by itself, be enough to confer standing to challenge a network adequacy determination. However, the fact that Petitioner McCarthy, who qualifies for a federal subsidy, cannot access that subsidy without purchasing a policy that she asserts has been improperly certified by the Department as being compliant with those standards, coupled with her allegation that the only way to make Anthem's network adequate is through the inclusion of Frisbie, is enough to give her standing.

The fact that Petitioner McCarthy has standing to obtain a hearing does not mean she will ultimately be entitled to the relief she seeks. Indeed, the Department cannot order Anthem to contract with Frisbie, even if she succeeds in demonstrating that Anthem's network is inadequate without Frisbie. As explained in my December 11 order, the network adequacy standards do not require that every carrier contract with every provider, or that any particular enrolled member have access to any particular provider. Rather, these standards look at the needs of the entire enrolled population. The Department has no authority to order a carrier to contract with any particular provider – only to order the carrier to correct any deficiencies. This could be accomplished in several ways, including a decision to leave the market, or not to market plans in a particular county.

Given the anomalous circumstance of a single Marketplace carrier, the fact that Petitioner McCarthy has made a prima facie showing of injury in fact, and the lack of clear guidance on the degree to which a showing of redressibility is required in the administrative context, my decision is to allow Petitioner McCarthy to present her arguments through an adjudicative hearing.

Nothing in this order should be construed as a ruling on Petitioners' substantive claim that Anthem's network is not adequate, or on any issue other than Petitioners' standing for purposes of commencing an adjudicative hearing under RSA 400-A:17.

Order

In view of the analysis above, I find:

1. Petitioner McCarthy has standing to challenge the adequacy of Anthem's network because she has alleged that she has had to choose between a subsidized plan utilizing a provider network she asserts is inadequate and a more expensive plan with an adequate network. I am scheduling a hearing to give her the opportunity to demonstrate that Anthem's network can only be adequate within the meaning of applicable network adequacy standards if it includes Frisbie. In all other respects, the December 11, 2013 order is affirmed.

2. Accordingly, pursuant to New Hampshire Revised Statutes Annotated RSA 400-A:17, an adjudicative hearing shall commence on Wednesday, April 9, 2014, at 10:00 a.m. at the offices of the New Hampshire Insurance Department, 21 South Fruit Street, Suite 14 in Concord, New Hampshire.

3. The hearing shall be conducted pursuant to the practices and procedures set forth in RSA 541-A; RSA 400-A; and New Hampshire Code of Administrative Rules Ins 200, Practices and Procedures.

4. The Docket Number for this proceeding shall change from INS 13-038-AR to INS 13-038-AP.

5. I shall preside at the hearing as hearing officer and Chiara Dolcino, Department General Counsel, shall serve as my advisor.

6. Sarah Prescott shall serve as clerk to the Hearing Officer. The parties should direct all communications to Ms. Prescott, whose contact information is:

   Sarah Prescott, Clerk
   New Hampshire Insurance Department
   21 South Fruit Street, Suite 14
   Concord, NH 03301
   Tel: (603) 271-2261
   Fax: (603) 271-1406
   Email: sarah.prescott@ins.nh.gov

7. Richard P. McCaffrey, Esquire shall appear as staff advocate, representing the interests of the Department's and its assertion that the Anthem network was properly certified as meeting state and federal network adequacy standards.

8. Petitioner McCarthy has the right to be represented by counsel at her expense.

9. Anthem has the right to file a motion to intervene in the adjudicative proceeding in accordance with RSA 541-A:32 in order to be granted party status. Anthem shall file any such motion as soon as possible.

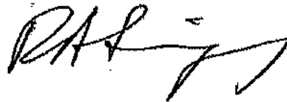
10. Counsel that represents any party to this proceeding shall file a Notice of Appearance in accordance with Ins 203.04(b) with Clerk Sarah Prescott as soon as possible.

11. Any other motions of any party shall be filed as soon as possible in order to expedite the scheduling of a pre-hearing conference to aid in the disposition of the proceeding in accordance with Ins 204.13.

12. A record of the hearing in this matter shall be made by audio recording. However, any party may request that the hearing be transcribed by a certified court reporter. The costs incurred for the services of a certified court reporter shall be borne by the requesting party. The party requesting transcription of the proceedings shall file a written request for a certified court reporter with the Commissioner or his designated representative at least 10 days prior to the scheduled hearing date.

It is SO ORDERED.

NEW HAMPSHIRE INSURANCE DEPARTMENT



Dated: March, 28, 2014

Roger A. Sevigny, Commissioner