THE STATE OF NEW HAMPSHIRE

INSURANCE DEPARTMENT

In re Petition of Margaret McCarthy

Docket No. INS 13-038-AP

**POST-HEARING PROPOSED FINDINGS OF FACT AND RULINGS OF LAW BY INTERVENING PARTY ANTHEM BLUE CROSS AND BLUE SHIELD**

In accordance with the directions of the Hearing Officer at the end of the May 14, 2014 adjudicative hearing, the undersigned Intervening Party, Anthem Blue Cross and Blue Shield ("Anthem"), hereby submits its post-hearing proposal for findings of fact and rulings of law in this contested matter.

1. The process for health carriers to submit their non-grandfathered individual and small group plans to be certified as Qualified Health Plans ("QHPs") for the New Hampshire Health Insurance Marketplace for open enrollment on October 1, 2013 and coverage effective January 1, 2014 ("Exchange") was set forth in New Hampshire Insurance Department ("NHID") Bulletin Docket No. INS 13-007-AB dated April 10, 2013. See NHID Exhibit F and Mr. Feldvebal's testimony at page 139 of the Hearing Transcript.

2. At the time NHID Exhibit F was issued, Petitioner Margaret McCarthy was a covered member under an Anthem Lumenos HSA Plan (Contract No. YGD0456M20167), which Plan became effective August 1, 2011 ("Current Health Coverage"). See NHID Exhibit E.

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3. Both RSA 420-J, Network Adequacy, which came into effect in 1998, and Insurance Rule 2700 et seq., which came into effect in 2002, were enacted eight years or more before the 2010 Affordable Care Act ("ACA"). See Mr. Feldvebal's testimony at pages 113-114 of the Hearing Transcript.

4. The mandates of the ACA pertaining to the creation of the Exchange and the certification of QHPs for the Exchange created a unique and challenging task for the NHID, as the existing network adequacy rules did not entirely fit the job of reviewing the proposed QHPs before sale. See Mr. Feldvebal's testimony at page 174 of the Hearing Transcript. In particular, the NHID was faced with applying its network adequacy standards, which were written for retrospective reviews of health carriers' plans, prospectively for the purposes of reviewing proposed QHPs and making QHP recommendations to the federal government. See Mr. Feldvebal's testimony at page 125 and 136 of the Hearing Transcript.

5. On May 31, 2013, Anthem submitted its Network Adequacy Filing for its proposed individual health plans on and off the Exchange and the SHOP Exchange ("Pathway Network"). The Hearing Officer can and should take official notice of the NHID's receipt of the Filing pursuant to RSA 541-A:33. See also the NHID's January 14, 2014 compliance with the Petitioner's RSA 91-A Request (see Bates No. 066) and Mr. Wilkey's testimony at page 201 of the Hearing Transcript.

6. On June 24, 2013, Anthem submitted its supplemental Network Adequacy Filing for its Pathway Network. The Hearing Officer can and should take official notice of the NHID's receipt of the Supplemental Filing pursuant to RSA 541-A:33. See also the

NHID's January 2014 compliance with the Petitioner's RSA 91-A Request (see Bates No. 178) and Mr. Wilkey's testimony at page 204 of the Hearing Transcript.

7. The NHID's primary responsibility in connection with the Exchange process was to review and recommend certification of QHPs to its partner on the Exchange, the U.S. Department of Health and Human Services ("HHS"). See NHID Exhibit F; Mr. Feldvebal's testimony at pages 123 and 145 of the Hearing Transcript; and Mr. Wilkey's testimony at pages 217-219 of the Hearing Transcript.

8. Anthem provided all information and documentation requested by the NHID in connection with Anthem's proposed QHPs and its submissions supporting the Pathway Network. See Mr. Feldvebal's testimony at page 179 of the Hearing Transcript and Mr. Wilkey's testimony at page 236 of the Hearing Transcript.

9. In the absence of any new or updated network adequacy laws enacted by the federal government or the New Hampshire Legislature, the NHID reasonably utilized its existing network adequacy framework in INS 2701 with modification. See Mr. Feldvebal's testimony at page 158 of the Hearing Transcript.

10. Some of the traditional network adequacy requirements, including those relating to customer surveys and wait times for appointments, could not be enforced in connection with the prospective review of Anthem's proposed QHPs because there was no membership before January 1, 2014. See Mr. Feldvebal's testimony at page 176 of the Hearing Transcript.

11. Both RSA 420-N and NHID Exhibit F provided the NHID with discretion and leeway in applying network adequacy standards prospectively to Anthem's proposed QHPs. See Mr. Feldvebal's testimony at pages 172-173 of the Hearing Transcript.

12. In reviewing Anthem's proposed QHPs, the NHID reasonably decided to apply existing network adequacy standards under INS 2701 unless to do so would be inconsistent with or prevent application of federal law, including the ACA goal of providing more affordable individual health coverage for offering on the Exchange. See Exhibit F and Mr. Feldvebal's testimony at pages 172-175 of the Hearing Transcript.

13. Under all the circumstances, the NHID reasonably decided that the focus of its network adequacy review would be the geographic accessibility standards. See Mr. Feldvebal's testimony at page 178 of the Hearing Transcript.

14. HHS' Center For Consumer Information And Insurance Oversight ("CCIIO"), not the NHID, had the authority to certify any QHP recommendations by the NHID. See NHID Exhibit F; Mr. Feldvebal's testimony at page 145 of the Hearing Transcript; and Mr. Wilkey's testimony at pages 217-219 of the Hearing Transcript.

15. On July 31, 2013, the NHID issued its decision recommending to CCIIO that Anthem's plans be certified as QHPs on the Exchange ("Department Decision"). See Mr. Wilkey's testimony at pages 217 and 235-236 of the Hearing Transcript.

16. On August 1, 2013, the Department issued and posted on its website a Press Release providing public notice of the Department Decision. See page 4, including footnote 2, of Commissioner's December 11, 2013 Order.

17. Petitioner Margaret McCarthy is deemed to have been put on proper and legal notice of the Department Decision by the August 1, 2013 Press Release.

18. By early or mid-September, 2013, Petitioner McCarthy had knowledge of the Department Decision and that Frisbie Memorial Hospital and its affiliated providers (collectively "Frisbie") were not included in Anthem's Pathway Network. See Anthem Exhibit 2/NHID Exhibit D and the Petitioner's testimony at pages 48-50 and 88-89 of the Hearing Transcript.

19. By early or mid-September 2013, Petitioner McCarthy knew that, if she chose to purchase health insurance on the Exchange, she would have to switch her providers from Frisbie. See the Petitioner's testimony at page 50 of the Hearing Transcript.

20. By early or mid-September, 2013, Petitioner Margaret McCarthy was on proper and legal notice that individuals applying for health insurance on the Exchange might be eligible to qualify for a federal subsidy.

21. In early September 2013, Petitioner McCarthy knew of Anthem's Pathway Network and the fact that Frisbie was not included in it. See Petitioner's testimony at page 48 of the Hearing Transcript.

22. By mid-September 2013, Petitioner McCarthy was very concerned about Anthem's Pathway Network, which had been approved by the Department Decision and certified by CCIIO, because she wanted to know if it applied to her Current Health Coverage and whether her Frisbie providers would be included in the Pathway Network. See Petitioner's testimony at pages 48-50 of the Hearing Transcript.

23. On or about September 16, 2013, Petitioner McCarthy was concerned that Anthem's Pathway Network, which had been approved by the Department Decision and certified by CCIIO, did not include Frisbie. See Petitioner's testimony at page 50 of the Hearing Transcript.

24. As of approximately September 16, 2013, Petitioner McCarthy was concerned because, if she chose to purchase an individual health policy through the Exchange, she would have to switch her Frisbie providers. See Petitioner's testimony at page 50 of the Hearing Transcript.

25. As of September 16, 2013, Petitioner McCarthy knew that, if she chose to purchase an individual health policy on the Exchange, she would have to switch her Frisbie providers. See Petitioner's testimony at page 50 of the Hearing Transcript.

26. Petitioner McCarthy's Petition For Hearing Pursuant To RSA 400-A:17 ("Petition") was filed with the NHID on November 6, 2013. See page 1 of the Commissioner's December 11, 2013 Order.

27. The Petition was filed with the NHID more than 30 days after Petitioner McCarthy knew about the Department Decision.

28. The Petition was filed with the NHID more than 30 days after Petitioner McCarthy knew that, if she purchased health coverage on the Exchange, she would have to switch her providers from Frisbie.

29. Petitioner McCarthy's Petition was not timely filed under the requirements of RSA 400-A: 17.

30. The Department Decision is the act or order of the Insurance Commissioner, from which Petitioner McCarthy seeks relief in her Petition under RSA 400-A:17. See the Petition; the parties' filings in Docket No. INS 13-038-AR; page 3 of the Commissioner's December 11, 2013 Order; and Mr. Wilkey's testimony at pages 235-236 of the Hearing Transcript.

31. The basic access requirement set forth in INS 2701.04(a) does not apply unless and until a health carrier, like Anthem, has 1000 or more covered persons in any county or hospital service area. See INS 2701.04(c); Mr. Feldvebal's testimony at pages 126 and 176 of the Hearing Transcript; and Mr. Wilkey's testimony at page 236 of the Hearing Transcript.

32. At no time before January 1, 2014 did Anthem have 1000 or more covered persons in Strafford County in its QHPs on the Exchange. See Mr. Feldvebal's testimony at pages 176-177 of the Hearing Transcript.

33. Given that Anthem did not have 1000 or more covered persons in Strafford County in its QHPs on the Exchange at any time before January 1, 2014, the basic access requirements set forth in INS 2701.04 did not apply to Anthem's proposed QHPs and its Pathway Network. See Mr. Feldvebal's testimony at pages 176-177 of the Hearing Transcript.

34. Given that Anthem did not have 1000 or more covered persons in Strafford County in its QHPs on the Exchange at any time before January 1, 2014, the basic access requirements set forth in INS 2701.04 did not apply to Anthem's proposed QHPs and its

Pathway Network, and therefore, Anthem's Pathway Network was deemed to have met all of those network adequacy requirements. See Mr. Feldvebal's testimony at pages 176-177 of the Hearing Transcript.

35. New Hampshire law has never required that all providers be allowed to participate in a health carrier's networks and it does not require that a QHP on the Exchange allow all providers to participate in the health carrier's network for that plan.

36. The ACA does not require that a QHP on the Exchange allow all providers to participate in the health carrier's network for that plan.

37. The standards for geographic accessibility in INS 2701.06 are satisfied if the distance or travel times set forth therein are met for at least 90 percent of the enrolled population within a particular county and, therefore, New Hampshire law did not require at any time, including at the time of the Department Decision, that Anthem's Pathway Network be adequate for any one particular person, including Petitioner McCarthy.

38. Prior to January 1, 2014 and in particular, prior to August 1, 2013, Anthem did not have any membership in any certified QHP for the Exchange, and therefore, prior to January 1, 2014, no data showing wait times for appointments existed for the Exchange plans. See Mr. Feldvebal's testimony at page 137 and 176 of the Hearing Transcript.

39. During the time that Anthem's proposed QHPs were under consideration by the NHID for recommendation to CCIIO for certification as QHPs in the May-July 2013 timeframe, Anthem was fully accredited by the National Committee for Quality Assurance

("NCQA"). See NHID Exhibit G and Mr. Feldvebal's testimony at page 180 of the Hearing Transcript.

40. During the time that Anthem's proposed QHPs were under consideration by the NHID for recommendation to CCIIO for certification as QHPs in the May-July 2013 timeframe, the NHID was fully aware that Anthem met the requirements and had the highest accreditation status of EXCELLENT from NCQA. See NHID Exhibit G and Mr. Feldvebal's testimony at page 180 of the Hearing Transcript.

41. Given that Anthem was fully accredited by NCQA and that no wait times for appointments data existed at the time the NHID reviewed Anthem's proposed QHPs for the Exchange in the May-July 2013 timeframe, the NHID reasonably concluded that Anthem met network adequacy for purposes of INS 2701.07. See NHID Exhibit G and Mr. Feldvebal's testimony at pages 137, 145-148, 176 and 180 of the Hearing Transcript.

42. As of the time of the Department Decision, Anthem was fully accredited by NCQA and met NCQA requirements. See NHID's Exhibit G and Mr. Feldvebal's testimony at pages 147 and 180 of the Hearing Transcript.

43. Prior to January 1, 2014 and in particular, as of the Department Decision, Anthem did not have any membership in any certified QHP for the Exchange that could be surveyed for any purpose. See Mr. Feldvebal's testimony at pages 137 and 176 of the Hearing Transcript.

44. Petitioner McCarthy's Current Health Coverage has remained in effect from August 1, 2011to the present and will not terminate until August 1, 2014. See NHID Exhibit E and Petitioner's testimony at pages 54 and 80 of the Hearing Transcript.

45. There have been no changes in Petitioner McCarthy's Current Health Coverage since before April 10, 2013, the date of NHID Exhibit F, and Ms. McCarthy continues to be covered for healthcare services received from Frisbie under the terms of her Health Coverage. See NHID Exhibit E and Petitioner's testimony at page 90 of the Hearing Transcript.

46. Petitioner McCarthy has never applied for health insurance on the Exchange, and she has never applied for, let alone been granted, a federal subsidy through the Exchange. See Petitioner's testimony at pages 61, 65, 82 and 86 of the Hearing Transcript.

47. Petitioner McCarthy made her own consumer choice not to purchase individual health insurance coverage through the Exchange. See Petitioner's testimony at pages 82 and 86 of the Hearing Transcript.

48. Petitioner McCarthy made her own consumer choice not to purchase individual health insurance coverage through Assurant Health or any other health carrier off the Exchange. See Petitioner's testimony at pages 83-84 of the Hearing Transcript.

49. Wentworth Douglas Hospital, a participating facility in Anthem's Pathway Network, is located approximately 11 miles from Petitioner McCarthy's home. See NHID Exhibit H, the Petitioner's Testimony at page 77 of the Hearing Transcript; and Mr. Feldvebal's testimony at page 157 of the Hearing Transcript.

50. Nine (9) PCPs, who accept new patients, are located within 15 miles of Petitioner McCarthy's home, including one PCP located closer to her home than her current PCP, Dr. Geller. See NHID Exhibit H and the Petitioner's Testimony at page 77 and 78 of the Hearing Transcript.

51. The Geo Access Reports (NHID Exhibits A, A2, B, B2) submitted by Anthem as part of its Pathway Network filings demonstrated compliance with the required geographic accessibility of Primary Care Providers ("PCPs") in Strafford County. See Mr. Wilkey's testimony at pages 213, 216-217 and 235 of the Hearing Transcript.

52. The Geo Access Reports (NHID Exhibits A, A2, B, B2) submitted by Anthem as part of its Pathway Network filings demonstrated compliance with the availability of Short-Term Acute Hospitals in Strafford County. See Mr. Wilkey's testimony at pages 213, 216-217 and 235 of the Hearing Transcript.

53. The Geo Access Reports (NHID Exhibits A, A2, B, B2) submitted by Anthem as part of its Pathway Network demonstrated compliance with the availability of all categories of Specialists identified in INS 2701.06 in Strafford County. See Mr. Wilkey's testimony at pages 213, 216-217 and 235 of the Hearing Transcript.

54. The provider information submitted to the NHID by Anthem in its Pathway Network filings included verification of open PCP panels in Stafford County. See NHID Exhibits A1 and B1, and Mr. Wilkey's testimony at pages 201-204 of the Hearing Transcript.

55. The NHID does not have the regulatory authority to order any health carrier, and, in particular to this contested matter, Anthem, to contract with any particular

provider(s), including Frisbie. See the previous filings and Orders from Docket No. INS. 13-038-AR, of which the Hearing Officer took official notice at the May 14, 2014 hearing; and Mr. Feldvebal's testimony at page 169 of the Hearing Transcript.

56. The NHID does not have the regulatory authority to order Anthem to include Frisbie in its Pathway Network.

57. The NHID does not have the regulatory authority to order that any particular individual, including Petitioner McCarthy, be guaranteed access to covered healthcare services from any particular provider, including from Frisbie. See Commissioner's December 11, 2013 Order.

58. Petitioner McCarthy did not have standing to seek an adjudicative hearing on the issue of whether Anthem's Pathway Network was adequate without the inclusion of Frisbie under New Hampshire law.

59. Petitioner McCarthy did not suffer any injury in fact as a direct result of the Department Decision.

60. Petitioner McCarthy did not sustain any injury in fact because she has never been denied access to a subsidy, but rather she has made the consumer choice not to apply for coverage on the Exchange or for a subsidy. See the Petitioner's testimony at pages 61, 65, and 86 of the Hearing Transcript.

61. Petitioner McCarthy did not sustain any injury in fact because she has never applied for a subsidy through the Exchange. See the Petitioner's testimony at page 86 of the Hearing Transcript.

62. Petitioner McCarthy did not sustain any injury in fact because she has never been applied for, let alone been granted, a subsidy through the Exchange. See the Petitioner's testimony at page 86 of the Hearing Transcript.

63. Petitioner McCarthy had not been sustained any injury in fact because she continues to have the opportunity to apply for coverage on the Exchange and for a subsidy.

64. Petitioner McCarthy has not sustained any injury in fact, as she admits that, even if she could renew her Current Health Coverage, she would not do so. See Petitioner's testimony at page 67 of the Hearing Transcript.

65. Petitioner McCarthy has not sustained any injury in fact, as there is no evidence establishing that, had she purchased health insurance on the Exchange and received a subsidy effective January 1, 2014, her premium cost (after applying the subsidy) would have been less than her premium expense would have been had she terminated her Current Health Coverage and purchased insurance off the Exchange with Assurant Health.

66. Petitioner McCarthy has not sustained any injury in fact because, had she exercised her right to early renew her Current Health Coverage, that coverage with continued access to Frisbie would have remained in effect until December 1, 2015 – during which time, she would have had the ability to select an Exchange plan offered by Harvard Pilgrim, Minuteman or any other health carrier announcing that it will offer QHPs on the Exchange in 2015, or to switch to an off Exchange plan with Assurant Health.

67. The relief Petitioner McCarthy seeks in her Petition by way of adjudicative hearing is the inclusion of Frisbie in Anthem's Pathway Network. See the Petition.

68. The NHID does not have the enforcement authority to order the relief sought by Petitioner McCarthy in her Petition. See page 7 of the Commissioner's December 11, 2013 Order (Docket No. INS 13-038–AR) and his March 28, 2014 Order and Notice of Hearing.

69. Even if Petitioner McCarthy were to demonstrate that she has suffered an injury in fact directly as a result of the Department Decision and further that Anthem's Pathway Network is inadequate as to her own needs, on those bases alone, Anthem's Pathway Network is not inadequate under New Hampshire law. See INS 2701.06.

70. Prior to December 1, 2013, Petitioner McCarthy was offered by Anthem the opportunity to early renew her Current Health Coverage and thereby extend that Health Coverage through December 1, 2014. See Petitioner's testimony at page 84 of the Hearing Transcript.

71. If Petitioner McCarthy had chosen to extend her Current Health Coverage early through December 1, 2014, she would have thereafter had the opportunity to extend her Health Coverage through December 1, 2015. See NHID Exhibit I; and statements at pages 182 and 184 of the Hearing Transcript.

72. All of Petitioner McCarthy's medical providers are located in Rochester, New Hampshire. See Petitioner's testimony at page 80 of the Hearing Transcript.

73. At all times since August 2011, the effective date of the Petitioner's Current Health Coverage, Petitioner McCarthy has been able to secure health care services without difficulty. See Petitioner's testimony at page 81 of the Hearing Transcript.

74. Petitioner McCarthy is not making any claim that she has been denied access to health care services for any reason from August 2011 to the present. See Petitioner's testimony at page 81 of the Hearing Transcript.

75. Petitioner McCarthy is not claiming that Anthem has violated the terms of her Current Health Coverage in any respect. See Petitioner's testimony at page 81 of the Hearing Transcript.

76. Petitioner McCarthy is not claiming that Anthem has violated any provider agreements with Frisbie. See Petitioner's Testimony at page 81 of the Hearing Transcript.

77. Petitioner McCarthy has not applied for health care coverage with any other health carrier since 2011. See Petitioner's testimony at page 82 of the Hearing Transcript.

78. Petitioner McCarthy has been aware that she has had, and continues to have, the option to apply for individual health coverage off the Exchange with Assurant Health that would allow her to continue to access health care services from Frisbie. See Petitioner's testimony at page 83 of the Hearing Transcript; and NHID's Exhibits J and J1.

79. Petitioner McCarthy made the consumer choice not to early renew her Current Health Coverage.

80. Petitioner McCarthy has never investigated whether the laboratory facility where she currently has lab work done through Frisbie also participates with Wentworth Douglas Hospital. See Petitioner's testimony at page 86 of the Hearing Transcript;

81. Petitioner McCarthy has never investigated whether there are any laboratory facilities affiliated with Wentworth Douglas Hospital that are closer to her home. See Petitioner's testimony at page 86 of the Hearing Transcript.

82. With managed care plans, like Anthem's QHPs on the Exchange, the covered person's access to the health care providers is necessarily limited, and the fact that Petitioner McCarthy's access to providers would be more limited on the Exchange than off the Exchange does not constitute an injury in fact. See Mr. Feldvebal's testimony at page 117 of the Hearing Transcript.

83. Petitioner McCarthy's claims that Anthem's Pathway Network supporting its proposed QHPs for offering on the Exchange did not meet network adequacy requirements and her Petition fail because she did not provide any expert testimony supporting those allegations.

Dated: June 4, 2014

By_____

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## CERTIFICATION

This is to certify that a copy of the foregoing was emailed, sent via facsimile and/or mailed, postage prepaid, on the above-written date, to:

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