Anthem Blue Cross and Blue Shield
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NH INSURANCE DEPARTMENT
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March 12, 2014

Jennifer Patterson, Esq.
New Hampshire Insurance Department
21 South Fruit Street, Suite 14
Concord, NH 03301

Re: In Re: Petition of Frisbie Memorial Hospital et al.

Dear Attorney Patterson:

Enclosed please find for filing with the Department, the Second Supplemental Brief by Anthem Blue Cross and Blue Shield Re: Aggrievement, an Affidavit of Robert Benedetto and a Redacted Affidavit of Robert Benedetto.

Thank you.

Sincerely,

Maria M. Proulx,
Associate General Counsel

Cc Jeremy D. Eggleton
MMP/ps
Enclosures

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THE STATE OF NEW HAMPSHIRE

INSURANCE DEPARTMENT

In re Petition of Frisbie Memorial Hospital et al

INS No. 13-038-AR

SECOND SUPPLEMENTAL BRIEF
BY ANTHEM BLUE CROSS AND BLUE SHIELD
RE: AGGRIEVEMENT

Pursuant to the January 17, 2014 Ruling On Request For Rehearing by the New Hampshire Insurance Department ("Department"), Anthem Blue Cross And Blue Shield ("Anthem") hereby respectfully submits this Second Supplemental Brief further demonstrating that the Petitioners, Frisbie Memorial Hospital ("Frisbie") and Margaret McCarthy ("Ms. McCarthy"), do not have standing to request an adjudicative hearing under Section II of RSA 400-A:17 and consequently, their November 6, 2013 Petition For Hearing Pursuant To RSA 400-A:17 ("Petition") should be denied.[1]

I. Overview Of Reasons The Petitioners Do Not Have Standing

In short, the Petition should be denied for the following reasons:

1. Petitioners have wholly failed to overcome the dispositive fact that – with or without an adjudicative hearing – the Department does not have the regulatory

[1] This filing supplements the Brief Of Anthem Blue And Cross Blue Shield Re: Aggrievement dated December 2, 2013; the Supplemental Brief By Anthem Blue Cross And Blue Shield Re: Aggrievement, including attachments, dated December 11, 2013; and the January 15, 2014 email of Anthem's Senior Legal Counsel opposing any rehearing based on the fact that the Petitioners' Request For Re-Hearing dated January 10, 2014 did not even address the specific deficiencies in the Petitioners' claims of aggrievement set forth in the Department's December 11, 2013 Order, let alone raise any new bases for reconsideration (collectively these Anthem fillings are referred to herein as "Anthem's Prior Submissions"). This Second Supplemental Brief also responds to the Petitioners' February 18, 2014 Supplemental Filing Concerning Standing.

authority to order the remedy that the Petitioners are seeking through an adjudicative hearing – i.e., the Department's statutory powers do not enable it to order Anthem to contract with Petitioner Frisbie in connection with the Exchange;[2]

2. Petitioners have not established injury in fact for the purpose of standing;

3. Petitioner Margaret McCarthy does not have standing for the additional reason that her health insurance has not changed; and

4. Petitioners have categorically failed to address, let alone refute, the undeniable fact that their Petition seeking an adjudicative hearing is time-barred and should not be considered.

II. Petitioners Do Not Have Standing Because The Department Does Not Have The Regulatory Authority To Order The Relief Being Sought

As is stated clearly and correctly in Insurance Commissioner Sevigny's December 11, 2013 Order ("Denial Order"), "[a] person cannot be found to be "aggrieved" where reversal of the challenged decision will not correct the alleged harm," Denial Order at p. 6, and "[w]hen the effect complained of is beyond the scope of the regulatory system, even a successful appeal will not redress the alleged harm." Denial Order at p. 7. In other words, to establish aggrievement, the Petitioners must demonstrate not only that they have a right or legally protected interest and that, as a direct result of the action taken by the Department,

[2] The remedy that the Petition under consideration expressly seeks is "an Order from the Department **requiring Anthem to permit Frisbie to participate in its marketplace available QHPs** according to the same terms and conditions as other providers." See Petition at Paragraph 21 (emphasis added).

they suffered an injury in fact of that legally protected interest, but that "the Department has authority to grant the relief they request." Denial Order at p. 7.

In his initial consideration of the Petitioners' claims of standing, the Commissioner recognized the boundaries of his Department's enumerated statutory powers and thus determined in his Denial Order that:

> "[e]ven if the Department's network adequacy review violated the insurance code in some substantive respect ... the Department has no authority to order Anthem to contract with any particular provider ... [network adequacy] 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."

Denial Order at p. 7. The Denial Order concludes that "both Petitioners lack standing because they have alleged no harm that a decision of the Department could remedy. There is no legal authority that would allow the Department to grant their requested relief of ordering Anthem to contract with Petitioner Frisbie." Denial Order at p. 8.[3]

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[3] The Denial Order is entirely consistent with the arguments proffered in Anthem's Prior Submissions. In fact, it speaks volumes that the Petitioners have not provided any legal authority supporting the proposition that the Department has the regulatory authority to issue the Order being sought in the Petition—i.e., to force Anthem to contract with Petitioner Frisbie as a participating provider in connection with its QHPs on the Exchange, thereby potentially interfering with Anthem's contracting with other providers participating on the Exchange. See Petition at ¶ 21 and Footnote 2 hereinabove.

Further, Petitioners' attempt at page 11 of their February 18, 2014 Supplemental Filing to tack on reference to other irrelevant and unsupported forms of relief only serves to demonstrate that Petitioners fully realize that their Petition seeks a remedy that is not available from the Department – with or without an adjudicative hearing. At this juncture, the only issue under consideration by the Department is whether or not the Petitioners have standing to request an adjudicative hearing pursuant to RSA 400-A:17.

Importantly, although the Petitioners go to great lengths in their February 18, 2014 Supplemental Filing to argue that Anthem's Pathway Network does not meet network adequacy requirements,[4] they fail to dispute two key prior findings by the Commissioner in his Denial Order: first, as discussed hereinabove, that the Department does not have the authority to require Anthem to contract with any particular provider, including Petitioner Frisbie; and second, that it does not have the authority to order that any particular enrolled member is entitled to access to care by any particular provider. Petitioners also do not refute or otherwise challenge the Commissioner's conclusion that the Department does not have the regulatory authority to remedy the harm allegedly caused by its recommendation of Pathway for approval at the federal level.[5] The absence of any argument that would support a conclusion by the Department that there is a legal basis for the Department to order the remedy being sought for the alleged harm caused by the Department's Decision (i.e., that Frisbie is not included in Anthem's Pathway Network) is glaring and demonstrates why the

[4] As the Petitioners essentially acknowledge in Paragraph 12 at pages 7-8 of their Supplemental Filing, however, the merits – or lack thereof – of their criticisms are not under consideration. The pending issue before the Commissioner is limited to their claimed standing. To avoid any impression that its silence be construed as any type of admission, however, Anthem unequivocally states – so the administrative record is clear – that its Pathway Network is more than adequate and that by way of all of its network adequacy filings and its compliance with all requests by, and directives of, the Department regarding Pathway, Anthem has demonstrated network adequacy.

[5] In fact, the Petitioners' Supplemental Filing misses the mark entirely when, instead of identifying legal bases for the Department to order Anthem to include Frisbie, it erroneously asserts at paragraph 12 on page 7 that "the essence of Anthem's likely objection to Frisbie's request for an adjudicative hearing is that Frisbie cannot prove the foregoing network adequacy analysis, and thereby shows standing to challenge the Department's decisions." As in their earlier submissions, the Petitioners' February 18, 2014 Supplemental Filing conveniently mixes together and blurs the facts that are germane to the determination of standing with the Petitioners' claims of network inadequacy on the merits. In fact, most, if not all, of the Petitioners' arguments are entirely irrelevant to the threshold issue of standing now before the Commissioner.

Petitioners do not meet the threshold requirement of standing to request an adjudicative hearing.

Contrary to Petitioners' position, Anthem asserts that there is no legal basis for the Department to take into consideration any of the events and/or testimony from the February 10, 2014 public hearing for the purpose of deciding the issue of standing, as nothing that occurred at the public hearing provides support for the Petitioners' claims of standing and/or is otherwise probative of the issue of standing.[6]

In the totality of the Petitioners' submissions, they have failed to provide the Department "with the grounds to be relied upon for the relief to be demanded" at the requested adjudicative hearing, as required by Section III of RSA 400-A:17. To be sure, despite their artful attempts to focus the Department on their displeasure with Anthem instead of on the requirements of standing, it is inescapable that the only result that would remedy the harm the Petitioners allege they have suffered due to the Department's decision – i.e., an Order requiring Anthem to include Frisbie in its Pathway Network for 2014 – has no support in the law and is in the Department's view beyond its own authority. This reality was argued in Anthem's Prior Submissions; it was stated clearly by the Commissioner in his December 11, 2013 Order denying the Petition; and it has remained unrefuted in any way,

[6] The futility of the Petitioners' position is illustrated by their indiscriminate call for the wholesale incorporation of the February 10, 2014 public informational hearing into the record as support for their Petition. This pronouncement, of course, is akin to throwing everything, but the kitchen sink, at the wall in the hope that something will stick. In fact, the February 10, 2014 public hearing was a positive general forum for the Department to present information to the public about "New Hampshire's regulatory standards and procedures for determining network adequacy for health insurance plans, and the balance between promoting access to care and controlling costs" (see the Department's Public Notice for the hearing) and for the Department to learn more about public concerns related to the new Exchange.

shape or form by the Petitioners in their Request For Rehearing and in their Supplemental Filing.[7]

Straying even farther from the immediate issue of standing, the Petitioners in paragraphs 14-17 of their February 18, 2014 Supplemental Filing stretch credulity by asserting that the Department's Decision approving the Pathway Network "raises substantial public policy concerns about the good faith implementation of the ACA" -- as if to argue that somehow the Department would better fulfill its Mission Statement ("... to promote and protect the public good by ensuring the existence of a safe and competitive insurance marketplace through the development and enforcement of the insurance laws ...") by scuttling the only health plans submitted by any insurer for approval as qualified health plans to serve New Hampshire residents and workers, and their families, through the Exchange.

[7] Of note, the fact that the Petitioners are without standing to challenge the Department's Decision does not mean that Anthem's QHPs are permitted to operate without regulation. Specifically, as it already has undertaken in connection with Pathway, the Department can initiate a market conduct examination under RSA 400-A:37, which permits the Commissioner to require an insurer to correct any non-compliance. With respect to network adequacy, under New Hampshire Administrative Rule Insurance 2701.10, if the Commissioner makes certain overall determinations regarding the accessibility of health care services, the Commissioner has the authority to require the insurer to institute a corrective action. As used in other contexts, a so-called "corrective action plan" means a proposal by which the entity will come into compliance" with the pertinent standards. See, e.g., Section 170-E:2, VI (Child Daycare, Residential Care, and Child-Placing Agencies Child Daycare Licensing) and N.H. Admin. R. Env-OR 702.06 (Department of Environmental Services; Oil and Remediation Programs). In the alternative, under 2701.10, the Commissioner has the authority to fine an insurer which is in non-compliance (i.e., Section 420-J:14 Penalties states in pertinent part that "any health carrier ... violating any of the provisions of this Chapter may be subject to an administrative fine not to exceed $2,500 per violation ..."). In short, separate and apart from the results of any adjudicative hearing, the Commissioner has enforcement authority to address network inadequacies by way of a corrective plan or the imposition of a penalty. As the Commissioner's Denial Order so clearly sets forth, however, those enforcement powers do not include the authority to order any insurer, including Anthem, to contract with any particular provider, including Frisbie, and they do not include the authority to guarantee that any particular enrolled person, including Ms. McCarthy, will have access to any particular health care providers.

This position is particularly absurd given that, to date, more than 16,000 individuals have enrolled in Anthem's plans served by the Pathway Network.[8]

III. The Petitioners Have Not Established The Requisite Injury In Fact Caused By The Department's Decision To Establish Standing

It is equally glaring that the Petitioners have not established that the harm they claim to have suffered, and for which they seek an Order requiring Petitioner Frisbie's inclusion in

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[8] Anthem worked diligently to prepare to participate in the Exchange for 2014, and in doing so, has created offerings available to consumers that it believes represents the best value, and the best balance of access and affordability. In fact, while achieving premiums that are on average 30% lower than what would be experienced with a broad network, Anthem would argue strongly that Pathway is a comprehensive network that meets and exceeds New Hampshire's network adequacy requirements. Pathway includes: 78% of primary care physicians; 87% of specialists, allied and other professional providers; 87% of ambulatory surgery providers; 98% of current ancillary network (e.g., lab, DME, ambulance, home care); essential community providers (ECPs); Hampstead Hospital; and 16 of New Hampshire's 26 acute care hospitals plus 1 Massachusetts tertiary hospital. To underscore the fact that Pathway is not a bare bones network, it should be emphasized that Anthem's potential customers on the Exchange will live within an average 9.9 miles of a short-term general hospital, which far exceeds the network adequacy regulation requiring than 90% of enrolled population live within 45 miles of a short-term general hospital. For example, for members in Strafford County, as previously noted in Footnote 4 of Anthem's December 2, 2013 Brief, the difference in travel to participating provider Wentworth Douglass Hospital and to Frisbie is only 8 miles (of course, members are free still to secure emergency services at either hospital).

The fact is that, despite the presence of many other regional and national commercial insurers in the State, it is Anthem alone that continues to serve all segments of the market – large and small groups, individuals, self-funded groups, and seniors. Exchange participation for 2014 is no exception, as Anthem is the only insurer offering plans designed to provide affordable individual coverage to previously uninsured New Hampshire residents through the Exchange.

While the lack of participation in the Exchange by other insurers is understandably frustrating and might serve to heighten concerns, the fact that Anthem has been the lone insurer so far to step up and embrace the Exchange's goal of helping those who have not had access to health insurance in the past reflects only positively on Anthem's ongoing commitment to the people living and working here in New Hampshire.

Anthem has demonstrated it greatly values its relationships with all of its New Hampshire 26 acute care hospitals and it must be highlighted that all of those hospitals will continue to serve the vast majority of Anthem's customers – meaning that approximately 90% of our customer base continues with coverage on a plan that uses our existing broad network. Even more significantly, Anthem respects the importance of the patient/physician relationship and knows that some people shopping for insurance, on the Exchange or off, make inclusion of their existing doctor or hospital in the Network their number one purchase criterion. In this regard, although Anthem knows that the Pathway Network will not please or meet the exact needs of every potential purchaser, it was designed to meet the needs of the majority of potential purchasers on the Exchange in 2014.

the Pathway Network, was caused in fact by the Department's Decision. Specifically, even if, arguendo, it were to be assumed that the Pathway Network does not meet network adequacy requirements; and even if, arguendo, it were to be assumed that the Department reversed its recommendation of approval for the Pathway Network; and even if, arguendo, it were to be assumed that the federal Center For Consumer Information And Insurance Oversight ("CCIIO") were to reverse its decision and disapprove the Pathway Network, the harm being claimed by the Petitioners – i.e., that Frisbie has been excluded – would not be remedied. Specifically, as the Commissioner's Denial Order clearly recognizes – without any challenge by the Petitioners – even under the extreme circumstances mentioned above, the Commissioner simply would not have the authority to order Anthem to include Frisbie in the Pathway Network. In fact, Anthem would be free to correct any deficienc(ies) identified by the Department by contracting with providers other than Petitioner Frisbie or by withdrawing its Plans from the Exchange for 2014. As the Commissioner reasonably and correctly concluded at page 8 of the Denial Order, "[t]he 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."

IV. Petitioner Margaret McCarthy Does Not Have Standing For The Additional Reason That Her Health Insurance Has Not Changed

Although the Petitioners make the general assertion that Petitioner McCarthy has suffered an injury in fact due to the Department's Decision, all of their specific characterizations in their filings up to the present clearly acknowledge that any such injury

remains only hypothetical. For example, in the Petition, they assert that, as a consequence of Petitioner Frisbie's exclusion from Pathway, Petitioner McCarthy "***will need to sever*** ... relationships with Frisbie-related providers ... ", not that she already had severed them. (Emphasis added.) Likewise, in paragraph 12 at page 4 of the Petitioners' December 2, 2013 Brief and in paragraph 7 of her own accompanying sworn Affidavit, Ms. McCarthy admits that she "***will suffer*** ... loss of ... current medical providers ... ", not that she had in fact lost them already. (Emphasis added.) Further, in the Petitioners' December 6, 2013 Reply Brief, rather than identify any actual injury as of that time, they only state that Ms. McCarthy "***has two options when her health plan runs out next year***"; and in their January 10, 2014 Request For Rehearing, the Petitioners do not identify any change in Petitioner McCarthy's Anthem health coverage as to that time. (Emphasis added.) Also, in their most recent February 18, 2014 Supplemental Filing, the Petitioners acknowledge in paragraph 13 at page 8 that Petitioner McCarthy is only "***faced with*** the choice of losing her medical providers ... or keeping them at a higher cost ... " (Emphasis added.) Finally, as verified by the Affidavit of Robert Benedetto attached hereto as Attachment D, Petitioner McCarthy's Anthem health insurance has remained in effect without interruption or change since before the Department's Decision on July 31, 2013. To be clear, although in 2013 she elected not to exercise her option to renew and keep her coverage in place through the end of November 2014, Petitioner McCarthy's Anthem coverage is the same now as it was at the time the Petition was filed on November 6, 2013; as it was on October 1, 2013 (when the Exchange opened); as it was on July 31, 2013 when Anthem's Pathway Network was approved for the Exchange; and as it was at the time of the Department issued its April 10, 2013 Bulletin

soliciting all New Hampshire licensed insurers to submit proposals for qualified health plans on the Exchange. To be sure, Ms. McCarthy's health insurance will remain the same until its renewal later in 2014. Under these circumstances, despite the Petitioners' carefully worded claims, she has not been harmed to date, as Petitioner McCarthy has not been required to change any of her providers, including those affiliated with Petitioner Frisbie, or to incur any increased cost for her insurance. It is simply indisputable that she has not suffered any injury in fact and therefore she has no standing here to request an adjudicative hearing.

V. Petitioners Do Not Have Standing To Request An Adjudicative Hearing Because The Petition Was Untimely

Under Section III of RSA 400-A:17 Hearings, any application for an adjudicative hearing under Section II (b) is required to be filed with the Commissioner within 30 days after the applicant "knew or reasonably should have known of" of the Department act, failure or order being complained of. As set forth in Anthem's Prior Submissions, and in particular, by way of the December 10, 2013 Affidavit of Robert Noonan, which is Attachment A to Anthem's December 11, 2013 Supplemental Brief, Anthem has unequivocally established that Petitioner Frisbie knew that it was not included in Anthem's Pathway Network even before Pathway was approved by the Department on July 31, 2013. Under New Hampshire law, actual notice is good notice. See, e.g., Appeal of Thomas Phillips, 75 A.3d 1083, 2013 N.H. LEXIS 88 (August 21, 2013). Here, Mr. Noonan's Affidavit clearly establishes that Petitioner Frisbie was advised that it would not be included in Anthem's Pathway Network in writing on June 21, 2013 and again on August 14, 2013. In none of its filings has Frisbie disputed this actual notice which was received more than eighty-four (84) days before the

Petition was actually filed.[9] For this additional reason, in accordance with New Hampshire law, the Petition must be denied.

VI. Conclusion

For all the foregoing reasons and those set forth in Anthem's Prior Submissions, the Petitioners simply cannot establish the requisite standing to entitle them to request and secure an adjudicative hearing under Section II of RSA 400-A:17.

WHEREFORE, Anthem respectfully submits that the Petition should be denied.

Dated: March 11, 2014

By Maria M. Proulx

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[9] Anthem feels compelled to reiterate its argument that the Petition should be denied for the reason that it is time-barred because, in their filings, the Petitioners state that they need to ensure that a complete record is created for a potential appeal to the New Hampshire Supreme Court under RSA 451. Under such circumstances, Anthem wants to make clear that the untimeliness of the Petition should, and will, be a defense raised in any eventual appeal of the Department's decision.

CERTIFICATION

This is to certify that on the above written date, a copy of the foregoing was sent via email, facsimile transmission, mailed, postpaid and/or hand delivered to the following counsel of record:

Jeremy D. Eggleton, Esq.
Orr & Reno
45 S. Main Street
P.O. Box 3550
Concord, NH 03302-3550

Maria M. Proulx

THE STATE OF NEW HAMPSHIRE

INSURANCE DEPARTMENT

In re Petition of Frisbie Memorial Hospital et al.

INS No. 13-038-AR

AFFIDAVIT OF ROBERT BENEDETTO
IN SUPPORT OF SECOND SUPPLEMENTAL BRIEF OF
ANTHEM BLUE CROSS AND BLUE SHIELD RE: AGGRIEVEMENT

I, Robert Benedetto, being duly sworn, depose and say:

1. I am over the age of 18 years and believe in the obligation of an oath.

2. I am Director of Sales for Anthem Blue Cross And Blue Shield ("Anthem").

3. I am submitting this Affidavit in further support of Anthem's position that the Petitioners do not have standing, as set forth in all of Anthem's Prior Submissions and in particular, in its Second Supplemental Brief being submitted to the Department.

4. Petitioner Margaret A. McCarthy of 30 Cocheco Avenue, Rochester, New Hampshire 03868 is a covered member under an Anthem [redacted] Plan (Contract No. [redacted]), which Plan became effective [redacted], 2011 ("Health Coverage").

5. Petitioner McCarthy's Health Coverage has remained in effect up to the present and it has a renewal date of [redacted], 2014.

6. There have been no changes in Petitioner McCarthy's Health Coverage since before April 10, 2013, the date of the Department's Bulletin (Docket No. INS 13-007-AB),

and Ms. McCarthy continues to be covered for health care services received at Petitioner Frisbie and its affiliated providers under the terms of her Health Coverage.

7. As of February 28, 2014, more than 16,000 individuals have enrolled in Anthem Qualified Health Plans served by the Pathway Network on the New Hampshire Exchange.

Dated at Manchester, New Hampshire this 11th day of March, 2014.

ROBERT BENEDETTO
Director of Sales
Anthem Blue Cross And Blue Shield

STATE OF NEW HAMPSHIRE)
) ss.
COUNTY OF HILLSBOROUGH)

Subscribed and sworn to before me this 11th day of March, 2014.

Commissioner of Superior Court
Notary Public

SARA A. WAGNER, Notary Public
My Commission Expires April 17, 2018