THE STATE OF NEW HAMPSHIRE

INSURANCE DEPARTMENT

In re Petition of Margaret McCarthy *et al*.

PETITIONER McCARTHY'S REPLY TO MOTION FOR REHEARING

Petitioner Margaret McCarthy responds to Anthem's Motion for Rehearing as follows:

I. The Department's Decision Approving The Network Adequacy Of Anthem's Marketplace Plans Was So Devoid Of Transparency That It Is Impossible To Argue That Ms. McCarthy's Petition Is Untimely.

The Department's decision approving Anthem's so-called Narrow Network occurred behind closed doors, without an iota of public input or scrutiny. The process of approving the Narrow Network was never noticed, no hearings were held, no documents were made public, no final decision released. It was the antithesis of transparent government. Under circumstances where it is impossible for the public to determine when the Department acted on the questions raised by Ms. McCarthy, Anthem's reliance on the timeliness requirement of RSA 400-A:17 is a naked attempt to prevent the Department from being compelled to rule that its Narrow Network is *prima facie* inadequate—as it must if it applies its own standards. *See* N.H. Admin R. Ins. 2701 *et seq*.

As Ms. McCarthy has previously argued in her earlier filings, together with Frisbie Memorial Hospital, the calendar by which the Department made its determinations of network adequacy was broad and, from the perspective of the public, inscrutable. RSA 400-A:17, II requires a petitioner to request a hearing from the Insurance Department (the "Department") within 30 days "after such person knew or

reasonably should have known of such act, impending act, failure, report, rule, regulation, or order[.]" *Id.* The "act" in this instance occurred at some point before July 31, 2013, when the Department—apparently—approved Anthem's proposed health plans for the New Hampshire Health Insurance Marketplace (the "Marketplace" or "Exchange") for submission to the U.S. Secretary of Health and Humans Services as Qualified Health Plans ("QHPs") under the Patient Protection and Affordable Care Act (the "ACA"). Other than vague references to having approved QHPs in an August 1, 2013 press release (included with Ms. McCarthy's original Petition), there was no public notice of any kind from the Department that detailed the kind, quality and nature of the plans approved.

In fact, other than the data released to Ms. McCarthy and Frisbie through this petition process, the only data concerning the nature of the Anthem QHPs, and their network adequacy, comes from the Healthcare.gov website, or from Anthem's own pronouncements in marketing and to the New Hampshire Legislature. Setting aside these bald assertions of adequacy by Anthem, none of the publicly available data available prior to the Petition included any network adequacy documentation. Moreover, Anthem's and Healthcare.gov's information, coming as it does from entities that are not the Department, is not an "act," "report," etc. sufficient to trigger the running of the 30 day limitation under RSA 400-A:17, II.

For the timeliness provisions of RSA 400-A:17, II to apply, the Department must act, and it must act in a manner that provides the public with notice of its action, the factual and legal basis of its action, and an opportunity to respond by a date certain. It is unlikely that any individual or entity involved in this Petition can identify any of those elements, let alone point to an order or pronouncement of the Department that would

trigger running of the 30 day limitation. In a situation where the Department issued no order, and the public was made aware of its decision only by viewing its impact as health plans began to be marketed and sold, "timeliness" has no meaning. Denying Ms. McCarthy's Petition as "time-barred" under these circumstances would constitute a disgraceful failure of due process. *E.g.*, *Appeal of Concord Steam Corp*., 130 N.H. 422, 428 (1988) (violation of state constitutional due process protections when findings of fact were issued without notice and an opportunity for participant in administrative proceeding to respond).

II. The Lack Of Notice Is Particularly Grievous As To Ms. McCarthy, Who Would Not Reasonably Have Learned Of Anthem's Network Inadequacies Until She Tried To Sign Up For Insurance.

Anthem has argued previously that *Frisbie* should have known—apparently by word of mouth as an "insider" in the health insurance marketplace—that Frisbie was omitted from the Narrow Network at some point before July 31, 2013, during the administrative process by which the Department approved the Narrow Network. Even assuming this to be a reasonable assumption, given Frisbie's status as a participating hospital in Anthem's other networks, and a complex business operation with a vested interest in knowing how the ACA was being implemented by Anthem and the Department, it does not apply to Ms. McCarthy. Ms. McCarthy is a consumer. To suggest that she has a duty to divine the inner workings of the Department and its negotiations with Anthem over network adequacy transcends irony. *There was no public information available* about the Department's decisions from which Ms. McCarthy could have been expected to examine the Narrow Network's adequacy. Prior to her filing of the Petition and the contemporaneously filed Request for Public Documents, no

Department information was available on this subject. Once again, it is folly to suggest that the provisions of RSA 400-A:17, II are triggered by information promulgated by Anthem, Healthcare.gov, or media outlets concerning the nature and extent of the narrow network.

III. The Department's August 1, 2013 Press Release Announcing Its Approval of QHPs For The Dept. Of Health And Human Services Is Does Not Constitute An "Act" Or Other Triggering Event Under RSA 400-A:17, II.

The Department issued a press release entitled "[The] Department Recommends Plans for Health Insurance Marketplace" on August 1, 2013, stating only that it "last night… submitted its recommendations for which health insurance plans should be offered on the [Exchange]." In the press release, the Department did not describe the Anthem Narrow Network; it provided no information concerning network adequacy; it did not discuss the information that it considered in approving the Narrow Network; and it provided not notice of a date for appeal, rehearing or review of its decision. No substantive content was publicized at all, making it impossible for the public to know whether there was anything about the Department's decisions that required appeal or review. It was not until information began to leak into the public debate from Anthem itself in September that anyone had any idea that Anthem was going to restrict access to hospitals and providers; and as Anthem was adding hospitals and providers in response to public criticism of its Narrow Network as late as mid-September, it was impossible to know what the final network would look like until October 1, 2013. Again, though, public knowledge of the scope and extent of the final Narrow Network *alone* would be insufficient to trigger the time limitations of RSA 400-A:17, II. It was not until Anthem's network adequacy documentation was finally made public that any individual,

outside of Anthem and the Department, had any information about the substantive aspects of the Department's decision-making.

Conclusion

The opaque process by which the Department analyzed Anthem's Narrow Network for adequacy provided no opportunity for public scrutiny. No notice was provided to the public—above all to the Petitioner, Ms. McCarthy, concerning Anthem's application, its submission data, or the Department's evaluation and final determination. There were no hearings, no publications; there was no order; there were no findings of fact or rulings of law. There simply was no event that would have triggered a time limit on Ms. McCarthy's right to petition under RSA 400-A:17, II. Absent a defined event, duly noticed, Ms. McCarthy's Petition must be assessed under the rule of reason. She filed a Petition a little more than a month after Healthcare.gov went "live"—and well before most people could use it effectively to purchase insurance. It would be a gross denial of due process, and a lamentable continuation of the same kind of lack of transparency that led to Anthem's inadequate network in the first place, not to give her the opportunity to be heard.

Respectfully submitted

Margaret McCarthy

By and through her attorneys,

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