

Orr&Reno

December 2, 2013

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VIA HAND-DELIVERY

Chiara Dolcino, Esq.
N.H. Insurance Department
21 South Fruit Street, Suite 14
Concord, NH 03301

Re: *In Re: Petition of Frisbie Memorial Hospital et al.*
***Docket No.* _____**

Dear Attorney Dolcino:

Enclosed please find for filing with the Department, a Proof of Standing, with attached Affidavits, relative to the above-referenced matter. Please note that due to the Thanksgiving holiday, Ms. McCarthy was unable to obtain a notarized signature on her Affidavit, but has confirmed the truth and accuracy of the Affidavit and will be submitting a signed, notarized original to us tomorrow (December 3). We will forward the PDF signature and original version of the Affidavit to the Department as soon as they are received by this office.

Very truly yours,



John A. Malmberg

JAM/mem
Enclosure
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Lawrence A. Kelly
(Of Counsel)

Neil P. Castaldo
(Of Counsel)

THE STATE OF NEW HAMPSHIRE

INSURANCE DEPARTMENT

In re Petition of Frisbie Memorial Hospital *et al.*

Docket No. _____

PROOF OF STANDING

Frisbie Memorial Hospital (“Frisbie”) and Margaret McCarthy (collectively the “Petitioners”) submit this Proof of Standing pursuant to the New Hampshire Insurance Department’s (the “Department”) November 14, 2013 letter requiring additional documentation addressing the Petitioners’ standing. In support hereof, Petitioners state:

1. Affidavits of Al Felgar, President and CEO of Frisbie Memorial Hospital, and Margaret McCarthy, are attached hereto and incorporated by reference.
2. RSA 400-A:17, II (b) requires that a Petitioner be “a person aggrieved” by a decision of the Department in order to receive a hearing from the Department by right.
3. The New Hampshire Supreme Court has interpreted the term “person aggrieved” to equate with an individual who has suffered an “injury in fact.” *See Weeks Restaurant Corp. v. City of Dover*, 119 N.H. 541, 543 (1979) (“There is no significant distinction between ‘persons directly affected,’ and ‘persons aggrieved.’” (citations omitted)); *Appeal of Richards*, 134 N.H. 148, 154 (1991) (a person “directly affected” by an administrative agency decision ... is one who has suffered or will suffer an injury in fact).

4. Therefore, to have standing, a party must demonstrate that has suffered or will suffer an injury in fact as a consequence of the decision. *Id.*; see *In re Union Telephone Co.*, 160 N.H. 309, 313 (2010).¹

5. There is no question that the Department was required under the terms of RSA 420-N:8, I to exercise its authority over form and rate approval and network adequacy for proposed plans being submitted for approval as Qualified Health Plans (“QHPs”) available on the New Hampshire Health Insurance Marketplace (the “Marketplace”) under the Patient Protection and Affordable Care Act (the “ACA”).

6. The Department’s review of proposed plans submitted by Anthem in 2013 constituted an exercise of that authority. When the Department approved the plans as “network adequate,” among other things, its approval constituted an “act or impending act, or by any report, rule, regulation, or order of the commissioner.” RSA 400-A:17, II(b).

7. Frisbie was aggrieved by the Department’s approval of the Anthem plans for the Marketplace because, in the formulation of Anthem’s Marketplace-available QHPs, Anthem never once contacted Frisbie to discuss participation or negotiate rates for care at Frisbie and with Frisbie affiliated providers. Frisbie and its employed physicians have been part of Anthem’s network of approved providers for many years and currently provide inpatient and outpatient services to many patients covered by Anthem’s existing plans. Anthem has never expressed any concern with the quality of care provided to its covered individuals. Because Frisbie is ready, willing and able to continue to provide care at negotiated rates, Frisbie’s omission from the Anthem QHPs deprives Frisbie of

¹ Case law dealing with standing to appeal administrative decisions is directly applicable to the “injury in fact” requirement of RSA 400-A:17, II.

patient visits and revenue it would have had available to it if Anthem had allowed Frisbie to participate in its QHPs.

8. Frisbie is further aggrieved because Anthem included Wentworth Douglas Hospital, in Dover, N.H., as a participating hospital in its QHPs. Wentworth Douglas hospital is a direct competitor for patient visits with Frisbie, and Anthem's decision to withhold even the opportunity to negotiate a competing service plan that included Frisbie, while allowing Wentworth Douglas to participate, materially impaired Frisbie's ability to compete for patients in its service area. *In re Union Telephone Co.*, 160 N.H. at 313 (“[B]ecause Union will face competition in its service area as a result of the PUC's orders, Union has standing to appeal them[.]”) (citing *New Hampshire Bankers' Association v. Nelson*, 113 N.H. 127, 129 (1973) (Banking commissioner approval of N.O.W. accounts available through savings banks gave checking account providers standing to appeal decision because the N.O.W. account was a hitherto unavailable product that competed with checking accounts offered by appealing banks)).

9. Furthermore, Frisbie is aggrieved by the Department's failure to provide public review of the compliance of Anthem's QHPs with state and federal network adequacy requirements. Because the analysis of whether Anthem's plans complied with network adequacy requirements occurred behind closed doors, Frisbie has no way of determining whether Anthem's omission of Frisbie is permissible under network adequacy requirements. Further complicating this issue is the Department's more recent assertion of confidentiality over documents submitted by Anthem relating to network adequacy and other issues. *See* Letters of November 12 and November 18, 2013, attached. If it is not permissible under network adequacy requirements, then Frisbie has

been injured by that omission because Anthem's failure to comply with network adequacy requirements has had the direct effect of denying Frisbie patients and revenue.

10. Finally Frisbie's mission is to service patients in its service area. The Department's decision has dramatically infringed on Frisbie's ability to provide service to patients in its service area, thereby directly impacting Frisbie's ability to fulfill its most basic mission as a community hospital. For that reason as well, Frisbie is aggrieved by the Department's failure to hold a public process and require Anthem to negotiate with Frisbie, a willing provider with a long history of providing quality health care services in the service area.

11. Margaret McCarthy is a person aggrieved because she is currently a patient of physicians associated with Frisbie. Her current health insurance policy is provided by Anthem and permits her to access her providers at Frisbie. Her policy is subject to non-renewal in 2014 and she has been informed by Anthem that she may either (a) purchase a Marketplace available policy without access to her current medical providers through Frisbie; or (b) purchase a new Anthem policy that retains her current Frisbie providers, but at an increased premium and without the possibility of receiving subsidies available on the Marketplace. It is not yet clear what impact the President's recent proposal to permit renewal of existing policies would have on Ms. McCarthy's situation. But even assuming Anthem undoes the cancellation of her existing policy, her policy costs will be substantially greater than they would be on the exchange.

12. Therefore, because the Department approved an Anthem plan that omitted Frisbie, Ms. McCarthy will suffer either (a) the loss of her medical providers, with whom she has a longstanding relationship, together with burden of searching for, and accessing

new providers covered by the Anthem Marketplace-available narrow network; or (b) increased health insurance costs and no opportunity to access health insurance subsidies otherwise available to similarly situated consumers.

13. In addition, because the Department's analysis of Anthem's QHPs occurred without public scrutiny, Ms. McCarthy has no way of ascertaining if the providers that she might have access to under the Marketplace-available QHPs are accessible to her within the defined terms of network adequacy for distance and driving time. Nor can Ms. McCarthy determine whether Anthem's publicly expressed goal of concentrating patients at narrow network facilities will result in her not being able to obtain the care she needs in a reasonable time frame due to the increase in patient volume at the providers available to her under the narrow network QHPs.

14. The ACA requires insurers to provide a network that "is sufficient in numbers and types of providers... to ensure that all services will be accessible without unreasonable delay." 45 C.F.R. §156.230; *see* ACA §1131(c)(1). The New Hampshire legislature has correctly vested the responsibility for ensuring that networks meet these ill-defined, but clearly broad, adequacy requirements in the Department. RSA 420-N:8, I. Yet without any kind of public scrutiny of the Department's determinations, the New Hampshire public, and the Petitioners specifically, are left to rely upon the representations of the sole insurance provider offering plans on the Marketplace, Anthem. This is unacceptable and has caused the Petitioners a direct and substantial injury in fact.

15. For the foregoing reasons, both Ms. McCarthy and Frisbie are persons aggrieved within the meaning of RSA 400-A:17, II and thus have standing to obtain a hearing on these issues as a matter of right.

Respectfully submitted

Frisbie Memorial Hospital
Margaret McCarthy

By and through their attorneys,

Date: December 2, 2013

By:



John A. Malmberg, No. 1600
Jeremy D. Eggleton, No. 18170

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THE STATE OF NEW HAMPSHIRE

INSURANCE DEPARTMENT

In re Petition of Frisbie Memorial Hospital *et al.*

Docket No. _____

AFFIDAVIT OF AL FELGAR

I, Al Felgar, under oath do hereby swear or affirm:

1. I am the President and CEO of Frisbie Memorial Hospital (“Frisbie”).
2. Frisbie is a New Hampshire non profit community hospital whose primary mission is to serve the medical care needs of patients in its service area.
3. Frisbie has provided medical care to patients covered by Anthem’s existing plans for years, and Anthem has never complained about the quality, cost or scope of services provided.
4. In the formulation of its New Hampshire Health Insurance Marketplace available plans, Anthem never once contacted me or anyone else at Frisbie to discuss participation or negotiate rates for care at Frisbie and with Frisbie affiliated providers.
5. Frisbie is ready, willing and able to provide care at negotiated rates.
6. Frisbie’s omission from the Anthem Marketplace available plans deprives Frisbie of patient visits and revenue it would have had available to it if Anthem had allowed Frisbie to participate in its Marketplace available plans.
7. Anthem’s Marketplace available plans include Wentworth Douglas Hospital, in Dover, N.H. Wentworth Douglas hospital is a direct competitor for patient visits with Frisbie. Anthem’s decision to withhold even the opportunity to negotiate a competing service plan that included Frisbie, while allowing Wentworth Douglas to

THE STATE OF NEW HAMPSHIRE

INSURANCE DEPARTMENT

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AFFIDAVIT OF MARGARET MCCARTHY

I, Margaret McCarthy do under oath hereby swear or affirm:

1. I live at 30 Cocheco Ave, East Rochester N.H. 03868.
2. I am currently a patient of physicians associated with Frisbie Memorial Hospital.
3. My current health insurance policy is provided by Anthem and permits me to access my providers at Frisbie.
4. I have received notification that my current policy cannot be renewed in 2014 and that I may either (a) purchase a Marketplace available policy without access to my current medical providers through Frisbie; or (b) purchase a new Anthem policy that retains my current Frisbie providers, but at an increased premium and without the possibility of receiving subsidies available on the New Hampshire Health Insurance Marketplace.
5. My current annual income levels would qualify me for \$2,897.00 subsidy on the Marketplace.
6. I do not yet know whether the President's recent relaxation of policies regarding policy cancellation will have any effect on whether I can continue my existing coverage. But even if I can my costs will far exceed those I would expect to pay on a Marketplace available given Marketplace available subsidies.

7. Therefore, due to Anthem's narrow network plans, I will suffer either (a) the loss of my current medical providers, with whom I have a longstanding relationship, together with burden of searching for and accessing new providers who are covered by the Anthem Marketplace-available narrow network; or (b) increased health insurance costs and no opportunity to access health insurance subsidies otherwise available to people like me.

8. I have no way of ascertaining if the providers that I might have access to under the Marketplace-available plans are accessible to me, either in terms of distance or time, whether those providers are taking new patients, and how long it may take to establish a new medical relationship and obtain appointments and care.

FURTHER AFFIANT SAYETH NOT

Margaret McCarthy

THE STATE OF NEW HAMPSHIRE
COUNTY OF STRAFFORD.

Personally appeared on this _____ day of December, 2013, the above-named Margaret McCarthy, and made oath that the foregoing is true and complete to the best of her knowledge and belief.

Justice of Peace/Notary Public
My commission expires: