

THE STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT

In re Petition of McCarthy

INS 13-038-AP

PETITIONER'S MOTION FOR ENTRY OF EXHIBITS

Ms. Margaret McCarthy moves for entry of the exhibits marked by her for identification during the May 14, 2014 hearing as full exhibits. In support hereof, Ms. McCarthy states:

1. At the conclusion of the May 14, 2014 hearing, the Commissioner, acting as Hearing Officer, requested that the parties submit a description of each exhibit, including its source, author and the reason for its inclusion, as well as legal arguments supporting its inclusion in the hearing record. The Commissioner also called for written offers of proof regarding exhibits. This Motion for entry of exhibits will state the provenance and relevancy of each exhibit.

2. Preliminarily, it is important to note that the Commissioner clarified the admissibility of testimony and exhibits that Ms. McCarthy might want to introduce as follows: "The Petitioner can present *any evidence* that she believes shows that there are deficiencies in the network in Strafford County that would not exist if Frisbie [Memorial Hospital] had been included in the Anthem network." T. at 10 (emphasis added). Under this broad standard, each of the Exhibits submitted by Ms. McCarthy is admissible and should be made a full exhibit.

3. Petitioner's Exhibit 1: The Department produced Exhibit 1 as part of its January 14, 2014 response to an RSA 91-A request for all documents considered by the Department in evaluating the network adequacy of Anthem's Pathway Network (or

"narrow network"). Exhibit 1 was authored by the Department, and describes the process by which the Department must review Qualified Health Plan ("QHP") submissions by insurers for consideration as under the ACA. This document is relevant to whether Anthem met the network adequacy requirements because it sets the standard by which Anthem's narrow network would be evaluated for network adequacy.

4. Petitioner's Exhibit 2: The Department produced Exhibit 2 as part of its January 14, 2014 response to an RSA 91-A request for all documents considered by the Department in evaluating the network adequacy of Anthem's narrow network. Exhibit 2 is a spreadsheet containing a provider list created by Anthem and submitted to the Department as part of its network adequacy submissions. Exhibit 2 has been redacted, at the request of the Department and Anthem, to show primary care providers in Strafford County, by name, address, accreditation and whether they are accepting new patients. This document is relevant because it shows the location of providers, which is an integral factor in determining whether Anthem's narrow network meets the mileage and driving time standards for compliance with N.H. R. Admin. Ins. 2701.06(b)(1) ("Ins. ____"). In addition, this document shows whether providers are accepting new patients, also a factor in Ins. 2701.06(b)(1), another relevant factor in determining whether Anthem's narrow network meets the Department's adequacy requirements.

5. Petitioner's Exhibit 3: The Department produced Exhibit 3 as part of its January 14, 2014 response to an RSA 91-A request for all documents considered by the Department in evaluating the network adequacy of Anthem's narrow network. Exhibit 3 is a so-called "GeoAccess Report," specifically addressing access to primary care providers ("PCPs"), prepared by Anthem and submitted to the Department as part of its

network adequacy filings. Exhibit 3 is relevant because it purports to show the location of providers and the number or percentage of insured members in its network that meet the mileage and distance requirements of Ins. 2701.06(b)(1).

6. Petitioner's Exhibits 4 and 5: The Department produced Exhibits 4 and 5 as part of its January 14, 2014 response to an RSA 91-A request for all documents considered by the Department in evaluating the network adequacy of Anthem's narrow network. Exhibits 4 and 5 were created and submitted by Anthem to the Department as part of its network adequacy filings for the narrow network. Exhibits 4 and 5 are relevant to whether Anthem has met the requirements of the Patient Protection and Affordable Care Act with regard to the adequacy of its network of Essential Community Providers ("ECPs").

7. Petitioner's Exhibit 6: The Department produced Exhibit 6 as part of its January 14, 2014 response to an RSA 91-A request for all documents considered by the Department in evaluating the network adequacy of Anthem's narrow network. Exhibit 6 was prepared by the Department as part of its analysis of the adequacy of Anthem's narrow network. Exhibit 6 is relevant to whether Anthem has met the requirements of the Department's rules governing network adequacy, Ins. 2701 *et seq.*

8. Petitioner's Exhibit 7: The Department produced Exhibit 7 as part of its January 14, 2014 response to an RSA 91-A request for all documents considered by the Department in evaluating the network adequacy of Anthem's narrow network. Exhibit 7 is a spreadsheet containing a provider list created by Anthem and submitted to the Department as part of its network adequacy submissions. Exhibit 7 has been redacted, at the request of the Department and Anthem, to show primary care providers in Strafford

County, by name, address, accreditation and whether they are accepting new patients.

This document is relevant because it shows the location of providers, which is an integral factor in determining whether Anthem's narrow network meets the mileage and driving time standards for compliance with N.H. R. Admin. Ins. 2701.06(b)(1) ("Ins. ____"). In addition, this document shows whether providers are accepting new patients, also a factor in Ins. 2701.06(b)(1), another relevant factor in determining whether Anthem's narrow network meets the Department's adequacy requirements.

9. Petitioner's Exhibits 8 and 9: New Hampshire Office of Energy and Planning ("OEP") authored Exhibit 8. The New Hampshire Office of Employment Security ("NHOES") authored Exhibit 9. Exhibit 8 shows the OEP's most recently available estimates for New Hampshire cities and towns, including those in Strafford County. Population figures for Strafford County are relevant to showing what percentage of the Strafford County population has access to primary care providers that meets the requirements of Ins. 2701.06(b). Exhibit 9 shows the NHOES's most recently available figures for income and unemployment rate by municipality in Strafford County. These figures are relevant to Ms. McCarthy's argument that Anthem's narrow network is inadequate in Strafford County because residents with lower income are those most likely to obtain insurance through the narrow network; and, those residents are more likely to be found in the northern part of Strafford County, farthest from the in-network providers. These facts are relevant to whether Anthem's narrow network meets the geographic access requirements of Ins. 2701.06(b). Although the New Hampshire Rules of Evidence do not apply in this proceeding, *see* Ins. 203.01(d)(4), these documents meet the standard for inclusion under N.H. R. Evid. 803(8) ("**Public Records and Reports** [:] Records,

reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases, matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." (emphasis added on title to exception). Even if the Rules of Evidence do not apply, the standard they enunciate for exceptions based upon the presumed authenticity of public records is reasonable to apply in this case.

10. Petitioner's Exhibit 10 is the entirety of the documents produced by the Department in its January 14, 2014 response to an RSA 91-A request for documents considered by the Department in evaluating the network adequacy of Anthem's narrow network. These documents are being submitted in rebuttal to the Department's submission of NHID Exhibit G, which purports to be a certificate of Anthem's compliance with various standards set by the National Committee for Quality Assurance ("NCQA"), and the assertion by Alexander Feldvebel, Department witness, that Exhibit G constitutes evidence that the Department considered whether Anthem met waiting time standards set by the NCQA in its evaluation of the network adequacy of Anthem's narrow network. Transcript of May 14, 2104 hearing at 145-48 ("T. at ___"); *see also*, T. at 30-31 (counsel agreeing that Petitioner's Exhibit 10 would be used in rebuttal).

11. Petitioner's Exhibit 12 is a report prepared by the New Hampshire Department of Health and Human Services entitled "2011 New Hampshire State Health

Profile." Exhibit 12 is a public record within the meaning of N.H. R. Evid. 803(8). *See* ¶8, *supra* (discussing the application of the public records exception to reports produced by New Hampshire State Agencies, incorporated herein by reference). Exhibit 12 will tend to show that lower income populations face greater access hurdles to health care, are more likely to be uninsured, and therefore are more likely to be obtaining insurance with Anthem's narrow network. These facts are relevant to Ms. McCarthy's assertion that the narrow network is not adequate, under Ins. 2701.06(b), to serve the populations in northern Strafford County that are most likely to be obtaining insurance through it.

12. Petitioner's Exhibit 11 is a February 11, 2014 newspaper article from Foster's Daily Democrat, Dover, N.H. containing statements by Anthem about the justification for its network. These statements are relevant because Department Witness Alexander Feldvebel testified at length about the "business decisions" of Anthem and Anthem's rationale in forming of its narrow network. T. at 109-12. Petitioner's Exhibit 11 is offered to rebut Mr. Feldvebel's testimony. Mr. Feldvebel's testimony concerning Anthem's reasonable business decisions creates a misleading advantage for the Department, and Ms. McCarthy must be permitted to offer Exhibit 11 as a specific contradiction that offsets that advantage. *See State v. Nightingale*, 160 N.H. 569, 579 (2010) (discussing the "opening the door" doctrine). To the extent that either Anthem or the Department object to the admissibility of Exhibit 11 on the ground that Mr. Feldvebel does not have personal knowledge of Anthem's "business decisions," the Commissioner should bear in mind that when counsel for Ms. McCarthy attempted to cross examine Mr. Feldvebel about the nature of his knowledge and its sources, Anthem objected and the Commissioner sustained the objection. T. at 154-56. Even if Mr. Feldvebel's knowledge

purported to come from public pronouncements by Anthem, *see id.*, Exhibit 11 offers a specific contradiction based upon similar public pronouncements and is admissible as rebuttal.

13. Petitioner's Exhibit 13 is a description of certain of Frisbie Memorial Hospital's affiliated care providers and a breakdown of the payor mix for each practice. Frisbie Memorial Hospital authored the document and is relevant because it corroborates Ms. McCarthy's assertions about the linkage between lower income and lower incidence of insurance as well as her assertion that the inclusion of Frisbie's affiliated providers in the narrow network would provide adequate access to health care providers for residents of northern Strafford County. These facts are relevant to the question whether Anthem's narrow network is adequate, under Ins. 2701.06(b), to meet the needs of the population in the towns of Milton, Middleton, Farmington, New Durham and Strafford, all in northern Strafford County where Anthem has *not a single in-network provider*. See Department Exhibit H.

WHEREFORE, Ms. McCarthy requests the Commissioner:

- A. Admit Petitioner's Exhibit 1 as a full exhibit in the May 14, 2014 hearing record.
- B. Admit Petitioner's Exhibit 2 as a full exhibit in the May 14, 2014 hearing record.
- C. Admit Petitioner's Exhibit 3 as a full exhibit in the May 14, 2014 hearing record.
- D. Admit Petitioner's Exhibit 4 as a full exhibit in the May 14, 2014 hearing record.
- E. Admit Petitioner's Exhibit 5 as a full exhibit in the May 14, 2014 hearing record.
- F. Admit Petitioner's Exhibit 6 as a full exhibit in the May 14, 2014 hearing record.
- G. Admit Petitioner's Exhibit 7 as a full exhibit in the May 14, 2014 hearing record.
- H. Admit Petitioner's Exhibit 8 as a full exhibit in the May 14, 2014 hearing record.

- I. Admit Petitioner's Exhibit 9 as a full exhibit in the May 14, 2014 hearing record.
- J. Admit Petitioner's Exhibit 10 as a full exhibit in the May 14, 2014 hearing record.
- K. Admit Petitioner's Exhibit 11 as a full exhibit in the May 14, 2014 hearing record.
- L. Admit Petitioner's Exhibit 12 as a full exhibit in the May 14, 2014 hearing record.
- M. Admit Petitioner's Exhibit 13 as a full exhibit in the May 14, 2014 hearing record.

Respectfully submitted,

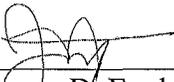
Margaret C. McCarthy

By her attorneys,

Orr & Reno, P.A.

Date: June 4, 2014

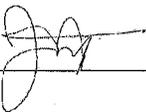
By:



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Certification

I, Jeremy D. Eggleton, certify that on this the 4th day of June, 2014, I caused a copy of the foregoing Motion to Enter Exhibits to be served via electronic mail and US mail upon Richard McCaffrey, Esq., New Hampshire Department of Insurance, and Michael Durham, Esq., counsel for Anthem Blue Cross Blue Shield.



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