

**State of New Hampshire  
Insurance Department**

**In Re: Petition of Margaret McCarthy  
Docket No. Ins. 13-038-AP**

**ORDER on MOTION IN LIMINE**

The Department asserts that pursuant to Ins 203.01(d)(4) the Petitioner be limited to presenting at hearing only evidence relating to the inadequacy of Anthem's Pathway Network "as it relates to Petitioner" and not its inadequacy with respect to "any unnamed, non-party consumers or medical providers." Anthem stated in oral argument at the May 8, 2014, Prehearing Conference that it joins in the Motion in Limine.

The Petitioner asserts that she should not be limited to proving or redressing the particularized wrongs only she has suffered. She cites in support various cases that she argues stand for the proposition that because she has established standing, she can present evidence that Anthem's network has harmed not just her, but all consumers on a statewide basis. Petitioner McCarthy argues that her standing enables her to challenge the adequacy of Anthem's network "writ large" and that "evidence concerning the inadequacy of that network as to any other party or region of the state is relevant and admissible."<sup>1</sup> She also argues that as a matter of public policy, because she is challenging a decision with a statewide impact on tens of thousands of citizens that may be inconsistent with the goals of the Affordable Care Act, she should be able to attack a decision that she argues is inconsistent with those goals.<sup>2</sup>

In order to determine what evidence is relevant under Ins 203.01(d)(4) I look to the purpose of the hearing that has been granted to the Petitioner in the March 28, 2014, Order and Notice of Hearing. That Order, after analyzing Petitioner's allegations, states that the Petitioner has the right to an adjudicative hearing "to give her the opportunity to demonstrate that Anthem's network can only be adequate within the meaning of applicable network adequacy standards if it includes Frisbie."<sup>3</sup> Therefore, relevant evidence for the purpose of this hearing is any

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<sup>1</sup> See Petitioner Objection to NH Insurance Department's Motion in Limine, at page 4, paragraph 7.

<sup>2</sup> *Id.* at Par. 8.

<sup>3</sup> See March 28, 2014, Order and Notice of Hearing at page 6, paragraph 1.

evidence relating to deficiencies in the Anthem network in Strafford County that would be remedied by the inclusion of Frisbie Hospital in that network.

Deficiencies in counties other than Strafford County would not be relevant because this information is not probative in establishing that the network in Strafford County is inadequate and can be made adequate by including Frisbie Hospital in the network. Similarly, evidence of harm to consumers outside Strafford County as a result of inadequacies in those counties is not probative, again, because this evidence would not establish that the network in Strafford County is inadequate as a result of the exclusion of Frisbie Hospital. The Petitioner has not convinced me that evidence concerning the inadequacy of the Anthem network as to other parties in other regions of the state is relevant or probative.

The Petitioner is not prohibited from introducing evidence concerning alleged deficiencies that impact both Strafford County and other counties, however, any exhibit presented should be redacted to the extent practicable to eliminate information that is irrelevant and immaterial as to Strafford County. Any testimony presented will be limited to testimony as to the impact of such deficiency on Strafford County. Assertions of deficiencies in the Anthem network that cannot be remedied by inclusion of Frisbie Hospital will not assist me in determining if Frisbie Hospital must be included in the Anthem network, and thus, are not relevant in this appeal.

I find the cases cited by Petitioner in support of her assertion that she can present evidence that Anthem's network has harmed not just her, but all consumers on a statewide basis unpersuasive. The case Appeal of Boston & Main Corp., 126 N.H. 360 (1985), turns on the legislative intent underlying specific laws authorizing the Public Utilities Commission to conduct a hearing and apportion of the cost for reconstruction of a bridge passing over a rail road track and is limited in its applicability. The two cases arising out of litigation in the District of Columbia, Appalachian Voices v. McCarthy, No. 12-0523, 2013 (D.D.C. October 29, 2013) and Louisiana Environmental Action Network v. U.S. EPA, 172 F.3rd 65 (U.S.App.D.C 1999), as well as the Supreme Court case Sierra Club v. Morton, 405 U.S. 727, 737 (1972), are also not germane as they discuss environmental suits brought under federal "citizen suit" provisions or discuss whether a citizen group has representational or organizational standing under federal law when these citizen groups file claims on behalf of their members. The Petitioner has failed to explain how these cases are relevant to an administrative appeal she has brought under state insurance law, not as an organization acting on behalf of its members, but as an individual.

The Petitioner has not referenced authority under Title XXVII or state law that would allow me to permit her to represent other consumers' interests. And there are sound reasons why an individual should not be permitted to do so. See e.g. Petition of Burling, 139 N.H. 266, 272 (1994) where the court, in discussing whether a third party can assert the rights of another

under the constitution, noted that the petitioner “may be asserting rights which those not before the Court may not wish to assert and may not in fact be the most effective advocate of the rights at issue.” (citation omitted).

Based on her allegations, the Petitioner has been given the opportunity to demonstrate in an adjudicative hearing that Anthem’s network can only be adequate within the meaning of applicable network adequacy standards, if it includes Frisbie Hospital and its providers. Accordingly, she may present evidence to establish the deficiencies existing in Strafford County that can only be addressed if Frisbie is included in the Anthem network. Evidence as to violations in other counties and violations that impact other consumers are not relevant in this context and shall not be permitted.

On the basis of and to the extent stated above, the Department’s Motion in Limine is GRANTED.

It is SO ORDERED.

NEW HAMPSHIRE INSURANCE DEPARTMENT

Dated: 5-13-14



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Roger A. Sevigny, Commissioner