State of New Hampshire
Insurance Department

In Re: Petition of Margaret McCarthy

Docket No. Ins. 13-038-AR

ORDER
AND NOTICE OF HEARING

Procedural History

On November 6, 2013, Frisbie Memorial Hospital and Margaret McCarthy ("Petitioners") filed a Petition for Hearing Pursuant to RSA 400-A:17 ("Petition") with the New Hampshire Insurance Department ("Department"). The Petition relates to the Department's July 31, 2013 recommendation that the federal Centers for Medicare and Medicaid Services ("CMS") certify certain health insurance plans being offered by Anthem Blue Cross and Blue Shield of New Hampshire ("Anthem") as Qualified Health Plans to be sold on the Health Insurance Marketplace ("Marketplace") being operated by the federal government on behalf of New Hampshire pursuant to the federal Affordable Care Act ("ACA").

As grounds for its hearing request under RSA 400-A:17,[1] Petitioner Frisbie Memorial Hospital ("Petitioner Frisbie"), which was not offered the opportunity to participate in Anthem's Marketplace network, claimed that it will lose revenue and be at a competitive disadvantage as compared to other medical providers because it is not part of the network. Petitioner Margaret McCarthy ("Petitioner McCarthy"), a patient of Petitioner Frisbie, alleged that she would have to change medical providers if she chose to purchase Anthem coverage through the Marketplace, which is the only way she can obtain federal tax subsidies to help her afford insurance.[2] As relief, the Petition asked that the Department (a) schedule a hearing on whether Anthem's Marketplace plans meet state and federal network adequacy standards; and (b) order Anthem to include Petitioner Frisbie in the provider network for its Marketplace plans.

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[1] A "person aggrieved" by a decision of the Insurance Commissioner may request a hearing on that decision under RSA 400-A:17, II(b). The hearing request "must be filed with the commissioner within 30 days after such person knew or reasonably should have known of such act," and must "briefly state the respects in which the applicant is so aggrieved, together with the ground to be relied upon for the relief to be demanded at the hearing." RSA 400-A:17, III.

[2] In an affidavit submitted December 2, 2013, Petitioner McCarthy stated that her current annual income level would qualify her for a subsidy of $2,897 on the Marketplace.

On December 11, 2013, following briefing by Petitioners and Anthem on the issue of standing, the Department ruled that neither Petitioner qualified as a "person aggrieved" under RSA 400-A:17, II(b) and that neither was entitled to an adjudicative hearing challenging the Department's recommendation to CMS. As additional grounds for denying standing to Petitioners, the Department noted that it lacked legal authority to grant Petitioners' requested relief, even if Petitioners could show that Anthem's network was inadequate, because no law requires that a particular health care provider be included in a particular health carrier's provider network.

Petitioners requested rehearing, asserting for the first time that Anthem's plans cannot meet network adequacy standards unless they include Petitioner Frisbie in their provider network. On January 17, 2014 the Department granted Petitioners' request for reconsideration, suspending its December 11 order. Specifically, the Department allowed Petitioners to submit additional pleadings and affidavits on the issue of standing, in light of extensive records relating to the Department's network adequacy review that were provided to Petitioners on January 14, 2014. In addition, on February 10, 2014, the Department held a four-hour non-adjudicative public hearing on network adequacy. Along with many other members of the public, Petitioner McCarthy made comments, and representatives of Petitioner Frisbie were afforded the opportunity to make a lengthy presentation, including a detailed slide show.

Petitioners filed their Supplemental Filing Concerning Standing on February 18, 2014, and on March 12, 2014, Anthem filed its Second Supplemental Brief on Aggrievement. On March 19, 2014, Petitioners indicated that they would not be filing a response to Anthem's Second Supplemental Brief.

Supplemental Assertions

In their Supplemental Filing, Petitioners make detailed arguments about the alleged inadequacies of Anthem's network, contending that the network cannot be found adequate under Marketplace standards without the inclusion of Petitioner Frisbie. Other than this, Petitioners make no new assertions with respect to Petitioner Frisbie's standing, relying instead on their previous argument that exclusion from the network has caused it economic injury. Petitioner McCarthy's allegations on standing are also largely unchanged. She asserts that because her health care providers are associated with Petitioner Frisbie, she has been injured in that she must either switch medical providers, or accept higher costs for insurance, because she will be unable to obtain the federal subsidies for which she would qualify if she purchased a Marketplace plan.

Anthem's Supplemental Brief urges the Department to affirm its December 11 order, arguing that the Department's recommendation to CMS has not caused either Petitioner

an "injury in fact" as required to establish standing under RSA 400-A:17. Anthem asserts that Petitioner McCarthy cannot have standing because, as attested by an affidavit submitted by Anthem, she remains on her 2013 health insurance plan, which includes her current medical providers. Thus, Anthem argues, she has not been forced to make a choice between switching providers and purchasing a Marketplace plan. Anthem also asserts that Petitioners' claims are time-barred, as Petitioner Frisbie knew it would not be included in Anthem's network even before the Department made its recommendation to CMS, yet made no attempt to challenge the Department's action until months later.

Findings and Analysis

After reviewing Petitioners' and Anthem's supplemental filings, I affirm my December 11, 2013 conclusion that Petitioner Frisbie is not "a person aggrieved by any act or impending act . . . of the commissioner" within the meaning of RSA 400-A:17, II(b). However, as discussed further below, I reverse my conclusion that Petitioner McCarthy lacks standing. Therefore, I am scheduling an adjudicative hearing to consider her contention that the Anthem plans cannot meet network adequacy standards without the inclusion of Petitioner Frisbie.

Except as noted below, the findings of my December 11 order are affirmed, readopted, and incorporated herein by reference. Specifically, I reaffirm my prior findings with respect to adjudicative hearing requirements under RSA 400-A:17, the nature and legal basis of the Department's recommendation of Marketplace plans to CMS, applicable network adequacy standards under RSA 420-J:7 and Ins Part 2701, and the legal standard for aggrieved party status.

In particular, I reaffirm my prior finding that the network adequacy standards do not require that an insurance carrier contract with any particular medical provider, or that any particular enrolled participant have access to any particular provider. Rather, the standards are framed to ensure reasonable access (defined in terms of miles or driving time) to the vast majority (typically 90%) of enrolled participants. See Ins 2701.06, Standards for Geographic Accessibility.

I also specifically reaffirm my finding that, to prove "injury in fact" in the context of an administrative appeal, a person must show that the action being challenged has or will have a direct effect on the person's legally protected interest. In re. Union Telephone Co., 160 N.H. 309, 313 (2010); Appeal of Campaign for Ratepayers Rights, 142 N.H. 629 (1998); Appeal of Richards, 134 N.H. 148 (1991).

I. Petitioner Frisbie's Claim of Standing

Petitioner Frisbie alleges that it is aggrieved by the Department's recommendation to CMS "because it has been excluded, without notice or an opportunity to participate, in [Anthem's] networks." Petition, paragraph 16. In its affidavit and brief on standing, Petitioner Frisbie provides more detail, asserting that Anthem did not initiate negotiations with it with regard to inclusion in the Marketplace plan network, despite the fact that "Frisbie and its employed physicians have been part of Anthem's network of approved providers for many years . . ." Proof of Standing, paragraph 7. Petitioner Frisbie also complains that Anthem included its competitor Wentworth Douglas Hospital in the Marketplace network, which action has allegedly "materially impaired Frisbie's ability to compete for patients in its service area." Proof of Standing, paragraph 8. Petitioner Frisbie does not add to these allegations in its supplemental filing on standing.

In my December 11 order, I found that Petitioner Frisbie lacked standing because its complaint of competitive disadvantage made to an authority that does not regulate hospitals, is insufficient to show injury in fact. Even if Petitioner Frisbie's allegations are true, being subject to increased competition, without a direct injury to a legal right, is not enough to confer standing. Nautilus of Exeter v. Town of Exeter, 139 N.H. 450 (1995). As I noted in the December 11 order, the cases Petitioner Frisbie cites in which increased or unfair competition was found to confer standing to pursue an administrative appeal involved decisions by regulatory agencies that favored one closely regulated entity over another. Union Telephone, 160 N.H. 309 (2010)(competing telephone companies regulated by Public Utilities Commission); N.H. Bankers Ass'n v. Nelson, 113 N.H. 127 (1973)(competing banks regulated by the banking commissioner). The Insurance Department regulates insurance carriers like Anthem, not medical providers like Petitioner Frisbie. A carrier's decision not to contract with a particular medical provider is not subject to review by the Department, and the Department has no authority to regulate competition between medical providers. Therefore, my decision that Petitioner Frisbie is not an "aggrieved person" remains unchanged.[3]

II. Petitioner McCarthy's Claim of Standing

Petitioner Margaret McCarthy alleges that she has standing because she is "required to give up health care providers associated with Frisbie in order to obtain insurance on the Marketplace." Petition, paragraph 16. Petitioner McCarthy asserts that she is a current

[3]As in my December 11 order, because I find that Petitioner Frisbie lacks standing, there is no need to address Anthem's argument that the Petition was untimely. Anthem's arguments about untimeliness relate only to Petitioner Frisbie, not to Petitioner McCarthy.

Anthem policyholder whose current policy permits her to access Frisbie providers, but who will not be able to renew her policy when its term ends in 2014. Proof of Standing, paragraph 11. Moreover, Petitioner McCarthy alleges, she will not be able to access subsidies through the Marketplace if she wishes to remain with her Frisbie providers. Id.

Petitioners' supplemental filing reiterates the claims in the Petition regarding Petitioner McCarthy's standing. However, it also provides additional context that convinces me that Petitioner McCarthy does have standing. As Petitioners assert, passage of the ACA makes a difference with respect to policyholders' interest in the adequacy of Anthem's network. The ACA requires most U.S. residents to have health insurance, and provides substantial subsidies to help those who income-qualify to purchase Marketplace plans.

Anthem is the only carrier who chose to offer Marketplace plans in New Hampshire during 2014, and the federal subsidies under the ACA are available only to consumers who purchase Marketplace plans. If Anthem's network were demonstrated to be inadequate, the "injury" of being forced to choose between a subsidized plan with an inadequate network, and a more expensive plan with an adequate network, would be sufficient to show standing.

Petitioner McCarthy has attested that she qualifies for a subsidy, which she would have received beginning in January 2014 if she had chosen to enroll in a Marketplace plan. She also alleges that the network for Anthem's Marketplace plans is inadequate. Thus, she has already had to forego the subsidy for which she is eligible in order to keep her medical providers. Taking as true (for purposes of the standing analysis only) her allegation that Anthem's network is inadequate and can only be made adequate by the inclusion of Frisbie, this is a sufficiently direct injury to confer standing under RSA 400-A:17, II(b).

Anthem has argued that Petitioner McCarthy does not have standing because she remains, for now, in her 2013 broad-network coverage. I am not persuaded by this argument. The injury Petitioner McCarthy claims to have suffered has already occurred, and continues each month that she foregoes the federal subsidy.

In view of all the circumstances, and in particular the provisions of the ACA, I conclude that Petitioner McCarthy has standing under RSA 400-A:17 as a consumer who claims to have been harmed by the circumstance that there is only one Marketplace provider and that this provider has an inadequate network which can only be made adequate by the inclusion of Frisbie. Therefore, she is entitled to an adjudicative hearing regarding the Department's approval of that network.

My decision that Petitioner McCarthy has standing rests on the fact that Anthem is the only carrier offering plans in the Marketplace, and that buying a Marketplace plan is the only way to access federal subsidies. The prospect of paying higher premiums for an

insurance plan with a broader network would not, by itself, be enough to confer standing to challenge a network adequacy determination. However, the fact that Petitioner McCarthy, who qualifies for a federal subsidy, cannot access that subsidy without purchasing a policy that she asserts has been improperly certified by the Department as being compliant with those standards, coupled with her allegation that the only way to make Anthem's network adequate is through the inclusion of Frisbie, is enough to give her standing.

The fact that Petitioner McCarthy has standing to obtain a hearing does not mean she will ultimately be entitled to the relief she seeks. Indeed, the Department cannot order Anthem to contract with Frisbie, even if she succeeds in demonstrating that Anthem's network is inadequate without Frisbie. As explained in my December 11 order, the network adequacy standards do not require that every carrier contract with every provider, or that any particular enrolled member have access to any particular provider. Rather, these standards look at the needs of the entire enrolled population. The Department has no authority to order a carrier to contract with any particular provider – only to order the carrier to correct any deficiencies. This could be accomplished in several ways, including a decision to leave the market, or not to market plans in a particular county.

Given the anomalous circumstance of a single Marketplace carrier, the fact that Petitioner McCarthy has made a prima facie showing of injury in fact, and the lack of clear guidance on the degree to which a showing of redressibility is required in the administrative context, my decision is to allow Petitioner McCarthy to present her arguments through an adjudicative hearing.

Nothing in this order should be construed as a ruling on Petitioners' substantive claim that Anthem's network is not adequate, or on any issue other than Petitioners' standing for purposes of commencing an adjudicative hearing under RSA 400-A:17.

Order

In view of the analysis above, I find:

1. Petitioner McCarthy has standing to challenge the adequacy of Anthem's network because she has alleged that she has had to choose between a subsidized plan utilizing a provider network she asserts is inadequate and a more expensive plan with an adequate network. I am scheduling a 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. In all other respects, the December 11, 2013 order is affirmed.

2. Accordingly, pursuant to New Hampshire Revised Statutes Annotated RSA 400-A:17, an adjudicative hearing shall commence on Wednesday, April 9, 2014, at 10:00 a.m. at the offices of the New Hampshire Insurance Department, 21 South Fruit Street, Suite 14 in Concord, New Hampshire.

3. The hearing shall be conducted pursuant to the practices and procedures set forth in RSA 541-A; RSA 400-A; and New Hampshire Code of Administrative Rules Ins 200, Practices and Procedures.

4. The Docket Number for this proceeding shall change from INS 13-038-AR to INS 13-038-AP.

5. I shall preside at the hearing as hearing officer and Chiara Dolcino, Department General Counsel, shall serve as my advisor.

6. Sarah Prescott shall serve as clerk to the Hearing Officer. The parties should direct all communications to Ms. Prescott, whose contact information is:

   Sarah Prescott, Clerk
   New Hampshire Insurance Department
   21 South Fruit Street, Suite 14
   Concord, NH 03301
   Tel: (603) 271-2261
   Fax: (603) 271-1406
   Email: sarah.prescott@ins.nh.gov

7. Richard P. McCaffrey, Esquire shall appear as staff advocate, representing the interests of the Department's and its assertion that the Anthem network was properly certified as meeting state and federal network adequacy standards.

8. Petitioner McCarthy has the right to be represented by counsel at her expense.

9. Anthem has the right to file a motion to intervene in the adjudicative proceeding in accordance with RSA 541-A:32 in order to be granted party status. Anthem shall file any such motion as soon as possible.

10. Counsel that represents any party to this proceeding shall file a Notice of Appearance in accordance with Ins 203.04(b) with Clerk Sarah Prescott as soon as possible.

11. Any other motions of any party shall be filed as soon as possible in order to expedite the scheduling of a pre-hearing conference to aid in the disposition of the proceeding in accordance with Ins 204.13.

12. A record of the hearing in this matter shall be made by audio recording. However, any party may request that the hearing be transcribed by a certified court reporter. The costs incurred for the services of a certified court reporter shall be borne by the requesting party. The party requesting transcription of the proceedings shall file a written request for a certified court reporter with the Commissioner or his designated representative at least 10 days prior to the scheduled hearing date.

It is SO ORDERED.

NEW HAMPSHIRE INSURANCE DEPARTMENT

Dated: March, 28, 2014

Roger A. Sevigny, Commissioner