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STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In re

Seattle Children's Hospital's Appeal of
OIC's Approvals of HBE Plan Filings

NO. 13-0293

MOTION TO STRIKE NEW REQUESTS
FOR RELIEF

I. INTRODUCTION

On August 11, 2014, Seattle Children's Hospital ("SCH") requested relief that goes well beyond the relief previously requested. Throughout these proceedings, the Office of the Insurance Commissioner ("OIC") and the health plans repeatedly asked that the "relief requested" be confirmed so that discovery, defenses and hearing presentation could be conducted. SCH counsel confirmed to the presiding officer and parties that the relief sought is that set out in the October 22, 2013, Demand for Hearing. The new requests for relief are not before this tribunal and should be stricken.

II. LEGAL ARGUMENT

The Demand for Hearing and the relief requested therein, like a complaint in a civil lawsuit, defines the playing field upon which discovery, motion practice and trial/hearing will be conducted. Adding issues at the 11th hour should not be permitted – especially given the record set forth below.¹

¹ The prejudice to the OIC and health plans is exacerbated by SCH's production of 1,000 pages of exhibits on August 12, 2014 – well after the depositions of the SCH employees who were obligated to produce these documents pursuant to subpoena duces tecum.

1 **A. The reasons why the new requests for relief should be stricken are demonstrated**
2 **by the chronology**

3 **October 22, 2014** – SCH serves its Demand for Hearing on the OIC stating:

4 SCH asks the OIC for relief regarding the decisions approving these
5 Exchange plans in one or more of the following ways:

- 6 • Reconsideration of the decisions;
- 7 • Imposition of a stay of the decisions;
- 8 • Revocation or reversal of its decisions;
- 9 • Such other and further relief as this tribunal may grant under its
10 authority.²

11 **April 14, 2014** – Prehearing conference [9:38:13 – 10:24:36 a.m.]:

12 Parker 13 9:44:47 a.m.	14 Ms. Petersen, this is Tim Parker appearing on behalf of 15 BridgeSpan, one of the intervenors. When we spoke earlier, 16 we were invited to go through the orders you have issued in 17 this case carefully and identify what the issues are and give 18 thought to what type of discovery, what type of evidence will 19 be called for. And I've undertaken to do that. I've had – I've 20 identified some, but I've had difficulty with certain things that 21 bear on all of the issues that are before you this afternoon. 22 That being, setting a hearing date, discovery, who can 23 participate, what type of evidence is going to come in. And 24 specifically, what I'm referring to is what this hearing is 25 ultimately about. I will let Mr. Madden speak for himself 26 obviously, but from his recent summary judgment, I came away with the understanding that the relief sought by Children's Hospital is a determination that the Commissioner's review of the networks last summer was not done correctly. And what Children's Hospital is requesting that they be ordered to go back and re-do that and do it in a manner that Children's argues is necessary under federal and state law. *** So I guess that's a long-winded way on my part of saying the ultimate issue in this proceeding eludes me and until I really know what that is, I'm not sure what evidence I want to put on or feel I must put on or what discovery I must do. *** So, with all of that, my request would be that we define what the ultimate issue is in this hearing and then talk about what discovery is going to be necessary and whether the intervenors can participate and how
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2 The new requests for relief are attached as Exhibit A.

1 long the hearing might last. Thank you.

2 **April 21, 2014** – Prehearing conference [9:38:13 – 11:35:08 a.m.]:

3 Parker 4 10:36:14 a.m.	Just for sake of clarity, could I ask that you, you tell us precisely what you're focusing on now is the issue? ***
5 Parker	6 Okay. When, when do you, when might you propose to answer that? I mean are we going to go through whatever discovery we go through and go through a hearing not knowing what, what 7 remedy Children's Hospital is after and what remedy you may render? Because I really think that drives so much of the rest of 8 this. So, while I agree that we need to define the remedy, that's all 3 here says, is we need to define the remedy. Okay, so let's define 9 the remedy. In a lawsuit, they say, oh, in the complaint we want an injunction prohibiting the defendant from doing a, b, and c. 10 Then the defendant knows that it's defending against. Or we want damages in the amount of x. Here we don't have anything. We're 11 at sea. I think it's incumbent upon the party that initiated the proceeding to tell the tribunal and other parties what remedy it is 12 seeking. And so far Mr. Madden has done an artful job of avoiding that question. 13 ***
14 Petersen	15 Mr. Madden, I'm asking you about, about the remedy. When we phrase this issue, are these your various choices of remedy? Tell 16 me how we can more concisely, and, what, is there a disagreement here on what the remedy should be? For example, I think the 17 Insurance Commissioner does have a difference of opinion on that. I think. But Mr. Madden?
18 Madden	19 Our, I'm sorry, <i>our request, you know, in the end is for revocation or reversal of the decision to approve these plans. That's it.</i> Now, how that's accomplished, whether you make that 20 decision, whether you direct the staff to reconsider because they didn't apply the correct legal standards or they didn't have the 21 right factual information. You know, that comes at the end....

22 **June 11, 2014** – Prehearing conference [9:38:14 – 10:51:53 a.m.]:

23 Parker 24 10:25:45 a.m.	Judge Finkle, this is Tim Parker on behalf of BridgeSpan. I join in that wholeheartedly. Two points I would like to make. The effort to define issues I think ultimately did not help the process and that the list of issues that was generated is really unworkable. The second thing is I have requested previously, and will request again sometime sufficiently in advance of the hearing, we be advised of what relief Children's Hospital is seeking in this proceeding.
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	Because it isn't clear to me and, without knowing precisely what relief Children's Hospital is asking you to grant, it makes it difficult for me to prepare my case and try my case.
Finkle	Other input on the statement of issues related and matters?
Madden	Your Honor, this is Mike Madden. * * * With respect to Mr. Parker's comment, yeah, Mr. Parker's been suggesting that that our appeal should be dismissed because there's no relief that you can grant. And our position on that has been consistent. If Mr. Parker believes that, he should make a motion. And, when he does, if he does, we'll respond. <i>But the relief requested is stated in our demand for hearing.</i> 10:28:04 a.m.

August 6, 2014 – Prehearing conference [10:30:32 – 11:44:24]:

Payton 11:32:47	Your honor, I understand the issue that the OIC is raising right here, but I have a very different response to that issue. There's a reason for a complaint in this case. And that is the document on which we have prepared the discovery, gotten our witnesses, looked for evidence, have presented evidence to you, have written a trial brief. It's based on the complaint that was filed in this matter. That complaint is not about 2015. ... They sought relief for one issue - Was the OIC correct in approving the plans when it did so in 2013 for the 2014 plan year? That is the only issue in their complaint. That is the only issue that we will be prepared to address at this. I cannot try things in one-week notice about the 2015 plan year. Frankly, it's not even final yet as Mr. Brown aptly points out, there's nothing to try because we don't know what it is going to be yet. But, that said, I do agree that he is correct in saying that as of January 1, 2014, the plans that are in effect everything that happens after that point is irrelevant to this hearing, because what you have been asked to decide in the complaint that Children's filed was, did the OIC correctly approve the plans under the regulations that were in effect at that time for the 2014 plan year? Whether or not, you know, 2014 went better, worse, slower than we all expected, and we all know that on the Exchange many unpredictable things have occurred during 2014. There's a lot of white noise about why, how, where, what and how it's working. It's not really something we can spend the rest of lives debating. That's not what's at issue in this case. So, I agree with the relief that Mr. Brown is striving for, which is this has to be about 2014 and ultimately it has to be about the issue that Children's raised in the complaint which is did the OIC look at the reg and apply the reg correctly when it approved these two plans in 2013 for the 2014 plan year? We do not need to spend any time talking about anything that transpired since January 1, 2014, and
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1		onward. This is not relevant based on the complaint that they filed.
2	Parker	I agree entirely with Ms. Payton. 11:35:35 a.m.

3 **B. The OIC and Presiding Officer are Without Authority to Grant the Newly**
4 **Requested Relief**

5 SCH seeks an order compelling the plans to pay SCH what it seeks – essentially
6 seeking an order compelling the health plans to contract with SCH. Neither the ACA nor the
7 insurance code affords the OIC such authority.

8 Q ... Does the commissioner's office have jurisdiction or authority over provider
reimbursement rates?

9 A No.

10 Q So the commissioner's office cannot instruct an issuer or a payor to pay a
certain amount to any particular provider?

11 A No.

12 Deposition of Jennifer Kreidler, July 15, 2014, 123:4-11.

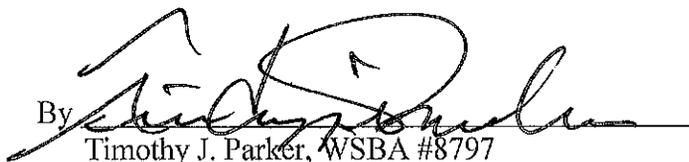
13 **III. CONCLUSION**

14 The issue is whether the OIC acted in accordance with the law when it reviewed the
15 health plans' networks in 2013. The relief available to the presiding officer is limited to
16 reversal of that decision or remand to the Commissioner for reconsideration.

17 If the presiding officer does not dismiss the request to overturn the OIC's approval of
18 the health plans' Exchange filings on the basis of mootness or lack of standing, it should
19 nevertheless strike the new requests for relief.

20 Respectfully submitted this 14th day of August, 2014.

21 CARNEY BADLEY SPELLMAN, P.S.

22
23 By 

Timothy J. Parker, WSBA #8797

Melissa J. Cunningham, WSBA #46537

Attorneys for BridgeSpan Health Company

CERTIFICATE OF SERVICE

I, Christine Williams, under oath hereby declare as follows: I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, and not a party to nor interested in this action. On August 14, 2014, I caused to be delivered via e-mail and U.S. mail a copy of the foregoing document on the following parties at the last known address as stated:

<p>OIC Hearings Unit – ORIGINAL Office of the Insurance Commissioner 5000 Capitol Boulevard Tumwater, WA 98501 Email: kellyc@oic.wa.gov</p> <p>Hon. George Finkle (Ret.) Email: gfinkle@jdrllc.com forbes@jdrllc.com</p>	<p><u>Attorney for Seattle Children’s Hospital</u> Michael Madden Carol Sue Janes Bennett Bigelow & Leedom, P.S. 601 Union Street, Suite 1500 Seattle, WA 98101 Email: mmadden@bbllaw.com csjanes@bbllaw.com</p>
<p><u>Legal Affairs Division</u> Charles Brown Legal Affairs Division Office of the Insurance Commissioner P.O. Box 40255 Olympia, WA 98504-0255 Email: charlesb@oic.wa.gov</p>	<p><u>Attorney for Premera Blue Cross</u> Gwendolyn C. Payton Lane Powell PC 1420 Fifth Avenue, Suite 4100 Seattle, WA 98101-2338 Email: paytong@lanepowell.com</p>

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 14th day of August, 2014, at Seattle, Washington.

Christine Williams, Legal Assistant

EXHIBIT A

**STATE OF WASHINGTON
BEFORE THE WASHINGTON STATE
OFFICE OF THE INSURANCE COMMISSIONER**

In the Matter of:

**Seattle Children's Hospital Appeal of OIC's
Approvals of HBE Plan Filings.**

Docket No. 13-0293

**SEATTLE CHILDREN'S
HOSPITAL'S HEARING BRIEF**

intervenors' networks were inadequate at their inception or became so later; the Commissioner has authority to remediate in either circumstance.

In this case, the appropriate remedy would be to order that, with respect to the 2014 plan year, medically necessary pediatric services provided by SCH to Premera/LifeWise and BridgeSpan QHP enrollees must be handled as if SCH and its affiliated professionals were in-network providers; *i.e.*, emergency care must be covered in accordance with benefit requirements and applicable law; utilization review must occur in accordance with standards applicable to participating providers¹¹⁰ and separate BLE or other separate forms of "coverage" reviews for non-emergency medically necessary care eliminated; and cost-sharing must be the same as if the enrollee received services from in-network providers; the plans must submit a form of provider agreement covering these arrangements to the OIC for its review and approval; and the plans must hold their enrollees harmless against balance-billing by paying SCH at the rates specified in the existing contracts with those plans. This package of remedies would protect enrollees, relieve SCH of the unfair burdens of the Commissioner's and plans' actions, and conform to the law.

This remedy would not have any significant impact on affordability of intervenors' plans. To begin with, intervenors' plans have very few pediatric QHP enrollees relative to total enrollment. For the small percentage of enrollees who need care at SCH, Premera/LifeWise is already approving BLEs and saying it will pay for that care at in-network rates. Even if a somewhat greater number will seek care at SCH as a result of this remedy, the increased payments likely will be offset by reduced administrative cost, not to mention the other benefits to

¹¹⁰ WAC 284-43-410(6)(b)(iv).