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SECRETARY OF COMMERCE

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ARKANSAS INSURANCE
DEPARTMENT

February 23, 2023

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NOTICE OF PUBLIC HEARING

Please be advised that an administrative hearing will be held at the Arkansas Insurance Department ("AID") on **May 3, 2023, at 10:00 AM** in the Riverview Conference Room, Second Floor, Arkansas Department of Commerce Building, One Commerce Way, Little Rock, Arkansas 72202. The Arkansas Insurance Commissioner ("Commissioner") shall obtain a court reporter to transcribe the proceeding. The Commissioner shall designate a Hearing Officer to preside over the administrative hearing and to make recommended ruling(s). The hearing shall pertain to the following matters and requested administrative penalties:

1. Petitioner Freeway Surgery Center, LLC ("Petitioner Freeway") and Centerview Surgery Center, LLC ("Petitioner Centerview") were ambulatory surgical centers but are currently licensed as temporary hospital facilities.

2. HMO Partners, Inc. is a health maintenance organization ("HMO"), licensed by the Department and transacting HMO contracts in this State. HMO Partners, Inc. does business as "Health Advantage" (hereafter, "Respondent Health Advantage").

3. USAble Mutual Insurance Company is a health insurer, licensed by the Department and transacting health insurance in this State. USAble Mutual Insurance Company does business as, "Arkansas Blue Cross and Blue Shield" (hereafter, "Respondent ABCBS"). For purposes of this Notice of Public Hearing ("NOPH"), Respondent Health Advantage and Respondent ABCBS shall be "Respondents."

4. Petitioner Freeway and Petitioner Centerview ("the Petitioners") converted to temporary hospitals under a federal waiver program in response to the COVID-19 pandemic, under a public health emergency. Petitioner Freeway alleges it has been a licensed temporary hospital facility by the Arkansas Department of Health ("ADOH") since June 1, 2020. Petitioner Centerview alleges it has been a licensed temporary hospital facility by ADOH since June 22, 2020.

5. The Arkansas General Assembly passed the Temporary Hospital Facility Act, (the "Temporary Hospital Facility Act"), now codified in Ark. Code Ann. § 23-99-1401 et seq., in 2021. The Temporary Hospital Facility Act became effective July 28, 2021.

6. On or about September 9, 2021, Petitioners filed a Petition at the Department alleging that Respondent ABCBS violated the Arkansas Temporary Hospital Facility Act. The Petitioners allege that pursuant to Ark. Code Ann. § 23-99-1404(c), Respondent ABCBS "must offer its standard and reasonable terms and conditions for a hospital, including without limitation rates of reimbursement." In their Petition, Petitioners conclude that "it has not done so."

7. On or about October 25, 2021, Respondent ABCBS filed a response to the Petition and made several arguments supporting their position that AID should deny the Petition. First, Respondent ABCBS contended that the public health emergency forming the basis of the Act no longer existed as of or after the effective date of the Act. Respondent contended that "because ADOH has not implemented a suspension of its rules related to hospitals, the Act has no current application," and only applies to "future emergencies."

Secondly, Respondent ABCBS contended that the Act only requires the provision of a "healthcare contract" to Petitioners and not a "hospital contract." The Respondent ABCBS additionally contended that earlier issued AID Adoption Orders permit the variation of rates "based on the scope of total health care services provided by a hospital." Finally, Respondent ABCBS argued that to the extent that the Temporary Hospital Facility Act applies to require hospital rates to be applied retroactively, it violates the Arkansas Constitution's prohibition on ex post facto law, in Ark. Const. Art. 2, § 17.

8. In response to the Petition, which the Commissioner chose to treat as a Complaint (hereafter "the Complaint"), on or about February 14, 2022, AID instituted a limited scope market conduct examination ("Exam") against all of the major health insurers and HMOs in the State, specifically, on Respondent ABCBS, Respondent Health Advantage, UnitedHealthcare, and Ambetter/QualChoice (hereafter, "Exam Respondents"). The notice of examination stated its scope, notifying the Exam Respondents, that "the exam shall be limited to the information and materials necessary to address the complaint filed by the Petitioners, dated September 9, 2021."

9. The Exam was completed on or about December 8, 2022. The Exam Respondents filed timely rebuttals to the examination. The Exam found "while the market wide analysis did not demonstrate any noncompliance with Ark. Code Ann. § 23-99-1404, based on insurer-specific analysis, there was significant variation in temporary hospital facility reimbursements across the individual healthcare insurers. Claims from one specific insurer appear to indicate that the temporary hospital facilities were reimbursed consistently lower than regular hospitals in both 2020 and 2021."

10. Arkansas Code Ann. § 23-99-1407 provides a violation of the Temporary Hospital Facility Act "is a violation of § 23-99-804 and the Healthcare Contracting Simplification Act, § 23-99-1201 et seq." Under the Healthcare Contracting Simplification Act, in Ark. Code Ann. § 23-99-1207, violations of such Act are subject to the Trade Practices Act, § 23-66-201 et seq.

11. Pursuant to Ark. Code Ann. § 23-61-110(a)(3), the Commissioner may order restitution of actual losses to affected persons if the Commissioner finds that any person has violated any provision of the Arkansas Insurance Code.

12. On or about February 6, 2023, the Commissioner issued adoption orders, adopting the Exam reports on the Exam Respondents. Notably, the Commissioner found Respondents ABCBS and Health Advantage in violation of the Temporary Hospital Facility Act, because Respondents' payment rates to Petitioners did not equal payment rates to hospitals. The Commissioner's Order indicated he would seek, following a hearing, one hundred thousand dollars ($100,000.00) in penalties for violations of the Trade Practices Act and restitution back to the effective date of the Act, July 28, 2021. The Commissioner subsequently amended his adoption order against these two Respondents on February 21, 2023, to, *inter alia*, remove such conclusions and to permit an administrative review of that finding by a Hearing Officer.

13. AID continues to interpret Ark. Code Ann. § 23-99-1404(c) as requiring Respondent ABCBS and Respondent Health Advantage to offer their standard and reasonable terms and conditions for hospitals, including without limitation rates of payment(s), to the Petitioners.

WHEREFORE, AID seeks the following rulings in an administrative proceeding:

1. The Temporary Hospital Facility Act applies to the public health emergency that was in effect at the time of the Act's passage and is not limited to future public emergencies.

2. The requirements of Ark. Code Ann. § 23-99-1404(c) are not in conflict with earlier issued AID adoption orders under the "Any Willing Provider Law" or any constitutional prohibitions relating to ex post facto law.

3. Ark. Code Ann. § 23-99-1404(c) requires that Respondent ABCBS and Respondent Health Advantage offer their standard and reasonable terms and conditions for hospitals, including without limitation rates of payment(s) for medical services or procedures, to the Petitioners.

4. The Commissioner may legally and constitutionally award restitution in this proceeding, under his or her powers and duties.

5. Assuming the above rulings are sustained, AID seeks a penalty phase after the above rulings. AID will seek one hundred thousand dollars ($100,000.00) in penalties for violations of the Trade Practices Act and an award of restitution to Petitioners and similarly adversely affected temporary hospital facilities that were paid lower rates than hospital rates, based on a reasonable methodology determined by the Hearing Officer.

Sincerely,

Booth Rand
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