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Corporate & Financial Regulation

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**Pennsylvania
Insurance Department**

Edward A. Bittner, Jr.

April 22, 2013

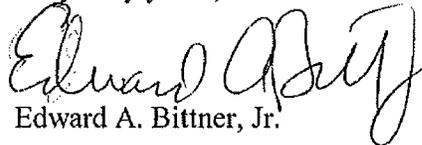
Cressinda E. Bybee
Sr. Insurance Company Licensing Specialist
Licensing Division
Bureau of Company Licensing and Financial Analysis
Office of Corporate and Financial Regulation
Pennsylvania Insurance Department
13th Floor, Strawberry Square
Harrisburg, PA 17120

Re: Responses of UPE to Comments of HealthAmerica and UPMC

Dear Ms. Bybee:

Enclosed please find the Response of UPE to Comments of David W. Fields, President and CEO, Health America, as well as the Response of UPE to Comments of W. Thomas McGough, Jr., Senior Vice President and Chief Legal Officer, UPMC, filed today by UPE with the Pennsylvania Insurance Department.

Very truly yours,


Edward A. Bittner, Jr.

03

**BEFORE THE INSURANCE DEPARTMENT
OF THE
COMMONWEALTH OF PENNSYLVANIA**

Statement Regarding the Acquisition of Control of or Merger with
Domestic Insurers:

Highmark Inc.; First Priority Life Insurance Company, Inc.;
Gateway Health Plan, Inc.; Highmark Casualty Insurance Company;
Highmark Senior Resources Inc.; HM Casualty Insurance Company;
HM Health Insurance Company, d/b/a Highmark Health Insurance Company;
HM Life Insurance Company; HMO of Northeastern Pennsylvania, Inc.,
d/b/a First Priority Health; Inter-County Health Plan, Inc.;
Inter-County Hospitalization Plan, Inc.; Keystone Health Plan West, Inc.;
United Concordia Companies, Inc.; United Concordia Dental Plans of Pennsylvania, Inc.;
United Concordia Life and Health Insurance Company

By UPE, a Pennsylvania nonprofit corporation

**Response of UPE to
Comments of David W. Fields,
President and CEO, HealthAmerica**

UPE submits this response to the letter dated April 18, 2013 from David W. Fields, President and CEO, HealthAmerica, to the Pennsylvania Insurance Department (the "Department") regarding the Form A filing currently pending before the Department regarding the proposed change of control of Highmark Inc. ("Highmark") in favor of UPE.

In his letter, Mr. Fields makes certain "observations" regarding the transactions contemplated by the Form A. UPE and Highmark disagree with a number of Mr. Fields' "observations", such as that the transactions involve "additional market power being handed to Highmark"; that Highmark "controls the insurance market in western Pennsylvania"; and that the transaction will allow Highmark "to exert absolute control over health insurance in western PA, and destroy the small amount of health insurance competition that exists today." On the other hand, UPE appreciates Mr. Fields' expressed support of the transactions, and concurs in his comment that the transactions will "preserve provider competition." UPE and Highmark would add that they also believe that the transactions will improve health care delivery and help contain health care costs, which is to the benefit of all residents of western Pennsylvania.

UPE and Highmark have previously responded to HealthAmerica's suggested "Statement of Terms" regarding the proposed Form A transactions which Mr. Fields attaches to his letter;¹ its prior response is incorporated herein by reference. Similarly, UPE has responded elsewhere to the suggestion by Mr. Fields – also advanced by UPMC – that entry by Highmark into an

¹ See UPE and Highmark Inc.'s Response to various points raised in the Department's draft consultant reports filed with the Department on April 19, 2013.

affiliation with the West Penn Allegheny Health System (“WPAHS”) means that Highmark cannot or should not have a provider contract with UPMC.² That response also is incorporated herein by reference. UPE, however, does wish to respond to certain allegations made by Mr. Fields in his letter regarding improper conduct by Highmark in connection with provider contracting activities of WPAHS, Jefferson Regional Medical Center (“JRMC”) and Saint Vincent Health System (“Saint Vincent”).

Mr. Fields states in his letter that negotiations with respect to renewal of facility contracts between HealthAmerica and WPAHS began “several months ago”, at which time WPAHS made demands that HealthAmerica considered to be “shocking” and “outrageous”.³ Mr. Fields then alleges that, at a subsequent meeting to discuss the demands, “the majority of WPAHS attendees were either [unidentified] Highmark employees or [unidentified] Highmark paid consultants”. Mr. Fields further alleges that in “recent” discussions with an officer of JRMC,⁴ the officer informed HealthAmerica that (again unidentified) “Highmark executives” were reviewing the contract and “would like a ‘substantial’ increase”. Finally, Mr. Fields states that, in anticipation of the Highmark “takeover” of Saint Vincent [*sic.*], HealthAmerica approached management regarding a contract extension and that management, “anxious to conclude prior to Highmark assuming control [*sic.*]”, made an unprecedented demand which, Mr. Fields states, was “eerily similar to the WPAHS demand”. With no further basis, he concludes that, “With Highmark directing negotiations, outrageous demands seem to follow.”⁵

UPE and Highmark take Mr. Fields’ comments (actually, accusations) seriously, even if they lack supporting details. In order to prepare this response, Highmark made an inquiry of senior management and obtained assurances that the members of senior management have no knowledge of any of the meetings or activities Mr. Fields refers to in his letter.

Moreover – and to Mr. Fields’ point -- UPE and Highmark acknowledge that they must

² See UPE’s Response to the comments of W. Thomas McGough, Jr., Senior Vice President and Chief Legal Officer, UPMC, being filed contemporaneously with this Response.

³ Although he does not set forth a specific timeframe for these “shocking” and “outrageous” demands, to the extent Mr. Fields is attributing them to Highmark, UPE notes that Highmark and WPAHS were embroiled in a lawsuit “several months ago”.

⁴ Mr. Fields states that the alleged conversation with the JRMC officer occurred more than a month before Highmark “was approved to take over” JRMC. Several other times in his letter, Mr. Fields also refers to a Highmark “takeover” of JRMC and Saint Vincent and, implicitly, WPAHS or words of similar import (e.g., Highmark will “assume control” of Saint Vincent). The proposed transactions between Highmark and WPAHS, JRMC and Saint Vincent are not acquisitions, which his language suggests. Rather, they are affiliations. The distinction is important, particularly in light of Mr. Fields’ allegations. Following consummation of the transactions contemplated by the Form A, Highmark will not control any provider-related activities of its current subsidiary HMPG or any of HMPG’s subsidiaries or affiliates. Further, Highmark will not control any of WPAHS, JRMC or Saint Vincent. Rather, Highmark’s sister company, currently known as UPE Provider Sub, will control the provider side activities while Highmark will control the insurance activities. Highmark and UPE Provider Sub will be under the common control of a single parent company, UPE.

⁵ There is an inherent contradiction in Mr. Fields’ statements in this allegation. On the one hand, he states that Saint Vincent management was “anxious to conclude negotiations prior to Highmark assuming control [*sic.*]”. Three sentences later he states (without support) that Highmark was “directing negotiations”. Mr. Fields does not attempt to reconcile these two statements. See note 4 for comment regarding Mr. Fields’ statement that the Saint Vincent transaction involves a Highmark “takeover” or Highmark will “assume control”.

have appropriate firewall protections in place between the persons who are responsible for managing Highmark's insurance activities and those who are responsible for managing Highmark's (and, subsequently, UPE's) provider activities so that that improper information sharing or other anticompetitive conduct does not occur. In this regard, Highmark has such firewall protections in place today. Highmark's Chief Privacy Officer has been assigned responsibility for implementing and enforcing the firewalls. To date, over 9,000 members of Highmark's workforce and its affiliated organizations have completed ongoing training on Highmark's firewall policies.

Finally, Highmark is not surprised to learn that a provider, such as WPAHS or Saint Vincent, recently tried to negotiate for higher reimbursements because Highmark, itself, has been presented with requests for double-digit increases when negotiating its own provider contracts. Such increased "demands" from providers are emblematic of today's new reality in the health care market and are not evidence of Highmark's influence.

Mr. Fields indicates that HealthAmerica has had longstanding and, presumably, mutually beneficial relationships with each of WPAHS, JRMC and St. Vincent. UPE looks forward to the continuation of those relationships for many years to come.

UPE
120 Fifth Avenue
Pittsburgh, PA 15222

DATE: April 22, 2013

cc: David W. Fields, President & CEO
HealthAmerica

**BEFORE THE INSURANCE DEPARTMENT
OF THE
COMMONWEALTH OF PENNSYLVANIA**

Statement Regarding the Acquisition of Control of or Merger with
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United Concordia Companies, Inc.; United Concordia Dental Plans of Pennsylvania, Inc.;
United Concordia Life and Health Insurance Company

By UPE, a Pennsylvania nonprofit corporation

**Response of UPE to
Comments of W. Thomas McGough, Jr.,
Senior Vice President and Chief Legal Officer, UPMC**

UPE submits this response to the letter dated April 19, 2013 from W. Thomas McGough, Jr., Senior Vice President and Chief Legal Officer, UPMC, to the Pennsylvania Insurance Department (the "Department") regarding the Form A filing currently pending before the Department regarding the proposed change of control of Highmark Inc. ("Highmark") in favor of UPE. The Form A filing includes within it, among other things, material relating to a proposed affiliation between Highmark and the West Penn Allegheny Health System, Inc. ("WPAHS"), which, like UPMC, provides tertiary and quaternary care in the southwestern Pennsylvania market. UPMC also operates a health insurance plan that is Highmark's closest competitor in the western Pennsylvania market.

Mr. McGough begins his letter with his version of the history of the production of the projections set forth in the Form A and its amendments and commentary on the analysis of the projections as prepared by the Department's consultants in connection with the Form A, Blackstone Advisory Partners L.P. ("Blackstone") and Compass Lexecon. UPE and Highmark believe that the history speaks for itself and that no additional commentary in that regard is necessary. UPE and Highmark also previously have filed a formal response to certain portions of the Blackstone and Compass Lexecon analyses;¹ that response is incorporated herein by reference.

The real point of Mr. McGough's letter, however, is to argue that the Department should use the Form A process to impose on the public a solution that is tailored to support UPMC's

¹ See UPE and Highmark Inc.'s Response to various points raised in the Department's draft consultant reports filed with the Department on April 19, 2013.

own selfish agenda; that will deprive large numbers of consumers in western Pennsylvania of meaningful health care and health insurance choices; that will enable a UPMC monopoly; and that will assure that health care costs continue their inexorable rise. UPE and Highmark address these issues below.

* * *

As an introduction to Mr. McGough's ultimate request, he states that, in its draft report of April 8, 2013, Compass Lexecon "soundly rejected Highmark's case for a new contract with UPMC, calling the underlying assumptions 'unreasonable' and the resulting projections 'not . . . credible.'" In this, Mr. McGough misstates the conclusions of the report and, in taking the quotations out of context, misrepresents them. As quoted elsewhere in Mr. McGough's letter,² the Compass Lexecon Report, in fact, finds that consumer demand *favors* a new contract between Highmark and UPMC.³ Further, the assumptions that the report finds to be "unreasonable" and "not . . . credible" are assumptions that UPMC will accept reasonable reimbursement rates and provisions that would permit Highmark to offer products that enable consumer choice based on price.⁴

As further introduction, Mr. McGough states that, "The combination of Highmark acquiring WPAHS [*sic.*] with Highmark and UPMC entering into a new contract would be toxic to competition in both the insurance market and the provider market."⁵ Citing statistics from the

² See pages 5-6 herein.

³ Compass Lexecon report, 195.

⁴ The full, unedited quote from the Compass Lexecon report reads as follows:

[IDN savings projected by Highmark with UPMC in-network] assume that *Highmark is able to negotiate only a [redacted] increase in reimbursements with UPMC and it is able to tier UPMC in its insurance products to attract patients away from UPMC to WPAHS. I find this set of assumptions to be unreasonable.* As I have described earlier, UPMC has prohibited Highmark from including UPMC in any tiered network product, except Highmark's Community Blue [*sic.*]. If Highmark is able to negotiate a provider contract with UPMC that allows Highmark to include UPMC in a tiered product, it is probable that UPMC would demand a higher reimbursement rate to reflect the likelihood that it would attract less volume from Highmark's insured members. Throughout the healthcare industry, the ability of an insurer to deliver greater volumes of discharges to a provider generally results in the provider agreeing to lower reimbursement rates or lower increases in existing reimbursement rates. Highmark's assumed [redacted] increase in reimbursement rates is inconsistent with this general principle. For this reason, *I do not find Highmark's projected IDN savings with UPMC in-network to be credible.*

Compass Lexecon report, 195.

Contrary to the statement set forth above, UPMC is not a participating provider in Highmark's Community Blue product. A more accurate statement is that UPMC has prohibited Highmark from offering any product other than a broad network product except for Community Blue. Elsewhere in the Compass Lexecon report, the author finds that the types of restrictions referred to here are anticompetitive because they prevent consumers from making rational health care choices based on cost. Compass Lexecon Report, 193. UPMC does not participate in Community Blue because it is unwilling to accept the narrow network's reduced reimbursement rates. The thrust of the report's conclusions, then, is that Highmark should not assume that UPMC is willing to compete on price. Not surprisingly, Mr. McGough does not address these conclusions.

⁵ Mr. McGough also states that both Blackstone and Compass Lexecon "caution that Highmark's acquisition of WPAHS [*sic.*], by itself, would create a 'reasonable likelihood of anticompetitive effects,' and call for conditions to 'mitigate' these effects." Again, Mr. McGough takes the quote out of context and ignores the actual point of the comments, which is to suggest the need for firewalls between insurer and provider sides of the UPE enterprise. Compass Lexecon Report, 117. UPE and Highmark do not disagree with these statements as they appear in context.

report regarding the market shares of each of Highmark, WPAHS and UPMC, he states,

“Simple arithmetic demonstrates that if Highmark acquires WPAHS [*sic.*] and then enters into a contract with UPMC, *that combination* will control at least 73 percent of the insurance market and 63 percent of the provider market. The anticompetitive potential (and temptations) for this health care duopoly, with both vertical and horizontal dimensions, are simply staggering . . . A new contract between a self-interested Highmark/WPAHS and a self-interested UPMC would easily extinguish any remaining or the future prospect of competition in health care in Western Pennsylvania, and for that reason alone is a very bad idea. (*Emphasis added*)

Mr. McGough thus conflates a contractual relationship between Highmark and UPMC into a full-blown merger for purposes of making a false argument. Highmark, UPMC and WPAHS are not merging. Following consummation of the proposed affiliation between Highmark and WPAHS, Highmark and UPMC will remain separate and independent legal organizations, the same as they are today. They will not jointly “control” the market or any part of it any more than they do today.⁶ And, while it cannot speak for UPMC, Highmark has no intention of colluding with UPMC (or anyone else) to extinguish competition. Mr. McGough’s argument is totally lacking in merit.

Mr. McGough then turns to a direct discussion of the conditions that UPMC proposes the Department apply in the event of approval of the Form A.

A.

Pretending to be concerned about the success of the proposed Highmark-WPAHS IDN, Mr. McGough disingenuously quotes from the Compass Lexecon report and states that, in light of “the many uncertainties and specific circumstances required for [Highmark’s] IDN to yield benefits,” the Department should impose certain reporting and other conditions suggested by Compass Lexecon and Blackstone (e.g., that Highmark be required to file reports regarding IDN savings; implement a remediation plan for WPAHS if the system’s financial performance has not turned around by a specific date; and be limited in the amount of capital that it can commit to further acquisitions, affiliations, etc. without notice to and/or approval by the Department).

UPE and Highmark have responded elsewhere to the substance of the above proposed conditions, and those responses are incorporated herein by reference.⁷ They note, however, that while the conditions as suggested by Blackstone and Compass Lexecon were intended to and, if properly implemented, would, protect the public interest – and, in particular, the interest of Highmark’s subscribers – UPMC’s motivation in endorsing them is completely different. UPMC has no interest in the success of the IDN, and no legitimate interest in seeing that any of

⁶ It is worth noting in this regard that for many years Highmark has contracted with UPMC despite the fact that UPMC operates a health plan that competes with Highmark. UPMC does not seem to have found this situation to be “toxic” or “anticompetitive”. The reason is obvious: until now, those arrangements have served its selfish interests.

⁷ See UPE and Highmark Inc.’s Response to various points raised in the Department’s draft consultant reports filed with the Department on April 19, 2013.

the above-referenced conditions are imposed. Mr. McGough does not even pretend that it does. UPMC's sole objective is to see that there are put in place as many obstacles as possible to IDN success (e.g., requiring that UPE/Highmark make public sensitive information about the financial condition of WPAHS that can guide UPMC strategy; and inhibiting Highmark's ability to react quickly to changing circumstances due to regulatory hurdles) – all the while knowing that, whatever is imposed applies only to UPE/Highmark and not to it.

UPMC's interest in the conditions referred to above vividly illustrates the risk UPE and Highmark noted in their response letter to the draft Blackstone and Compass Lexecon reports. If the conditions are painted with too broad a brush, as opposed to being narrowly tailored to address legitimate public interests, UPE, Highmark and WPAHS will be left to play on a field that is tilted dramatically in favor of a self-interested and unregulated UPMC monopoly.

B.-C.-D.

Mr. McGough then returns to the real thrust of his letter – arguing that, as part of its approval of UPE's Form A, the Department should impose a condition “that Highmark be precluded from renewing or seeking to renew its contracts with UPMC and [that] the existing contracts be allowed to expire” on December 31, 2014. In making this request, UPMC transparently is asking the Department to help it, by regulatory fiat, to impose its business strategy on Highmark, its customers and subscribers and the entire western Pennsylvania community.

Highmark believes that there is a serious question as to whether the Department even has the authority to impose the condition suggested by Mr. McGough. However, assuming for the sake of argument that it does, an action by the Department of this type would be breathtaking in scope and effect. Moreover, it would constitute extraordinarily bad public policy. Among other things, it would fly in the face of consumer demand. Moreover, it would effectively deprive the largest single group of insurance buying customers in western Pennsylvania (Highmark's customers) of any opportunity to obtain access under any circumstances to the largest single health provider in the region (UPMC). Such a decision also, and not coincidentally, would dramatically improve the competitive position of UPMC Health Plan, Highmark's closest competitor. In short, Mr. McGough is asking the Department to aid UPMC in rigging the market to enable a UPMC monopoly to the permanent detriment of consumers and the insurance-buying public.

Mr. McGough acknowledges that Ms. Guerin-Calvert considered and rejected this very suggestion,⁸ based on the same reasoning as above, and on the assessment (with which UPE and Highmark agree) that “*it is better to permit Highmark to attempt to respond to market demand, which appears to include consumer demand for a Highmark-UPMC product [sic.]*” (emphasis

⁸ Ms. Guerin-Calvert states that this suggestion was made by “several commenters”. The commenters were UPMC and the national insurers who recently began contracting with UPMC, all of whom have a vested interest in limiting Highmark's ability to compete on an equal footing. It is worth noting in this regard that WPAHS contracts with all the national carriers and that UPE fully expects that it will continue to do so following closing of the proposed affiliation with Highmark. WPAHS is willing to contract with UPMC Health Plan, but UPMC Health Plan has always refused to even discuss contracting with it.

added) even while Highmark works with WPAHS to make it a viable constraint on UPMC. Highmark concurs in Ms. Guerin-Calvert's conclusions in this regard.

Mr. McGough, however, states that, in reaching her conclusion, Ms. Guerin-Calvert overlooked a number of factors that, he says, make "the current situation in Western Pennsylvania unique" and require imposition of his proposed condition. He refers first to the argument noted above that Ms. Guerin-Calvert's analysis overlooks the "anti-competitive impact of a contract aligning Highmark/WPAHS and UPMC". As discussed above, this argument is fallacious.

Mr. McGough then makes the argument that, in reaching her conclusion, Ms. Guerin-Calvert "overlooks the time and effort that will be required for patients, subscribers, physicians, health systems, competing insurers, government officials and other interested parties to prepare for the massive transformation and disruption that will be caused by Highmark's Base Case" – Mr. McGough's code word for termination of the UPMC contract, which he refers to – unashamedly, and completely dishonestly – as "Highmark's proposal".

To be clear, termination of the Highmark-UPMC relationship is not Highmark's idea, and it never has been. Mr. McGough, of course, is well aware of that fact. He simply chooses to ignore it for purposes of his argument. As Mr. McGough acknowledges elsewhere in his letter, Highmark has been clear and consistent that it wants – and intends to continue to seek -- a long-term contract with UPMC that extends beyond the end of the current contract in 2014. Highmark also has been clear as to its rationale for this desire; i.e., that it believes that consumers and patients deserve the right to have options in health care, and the right to obtain services from the providers of their choice. Mr. McGough baldly states UPMC's position: "Whether or not [its proposed] condition is adopted, UPMC will not consummate a contract with Highmark . . ."⁹ For Mr. McGough then, to use "the largest disruption and dislocation of patients ever contemplated in a single region" – a disruption and dislocation that UPMC is determined to cause – to justify a request for a condition that UPMC, not Highmark, wants is truly audacious.

In fact, UPMC already has begun to deprive consumers of choice and to disrupt patient care in pursuit of market dominance. As has been reported, in part, in the public media,¹⁰ UPMC already is turning away Highmark customers and subscribers who participate in Highmark's Community Blue product – a limited network product designed to provide consumers with a lower premium option -- even when the patients are willing to pay the difference between Highmark's UPMC in-network and out-of-network rates. The stories of the patients who have been deprived of access to their doctors and other care providers for the sole purpose of advancing UPMC's selfish profit motives are heart-rending, and illustrate the lengths to which UPMC will go to deny Highmark the ability to offer real consumer choice, intimidate Highmark customers, undermine insurance competition, and artificially inflate health care costs. Further, they illustrate the boldness with which UPMC is willing to misappropriate tax-exempt charitable assets to pursue selfish objectives with no conceivable public benefit. In light of its behavior, UPMC's professed concerns for patients, subscribers, physicians, health systems, competing

⁹ In light of this statement, UPMC's request for a condition would appear to be moot.

¹⁰ See, e.g., "UPMC cuts off Highmark Community Blue Members," *Pittsburgh Post-Gazette* (March 2, 2013). Highmark is aware of numerous similar cases that have not been publicly reported.

insurers, government officials and others truly ring hollow.

* * *

For the reasons set forth above, UPE respectfully requests that the Department reject UPMC's proposed conditions, which serve no public interest, but rather are intended solely to advance UPMC's self-interests.

UPE
120 Fifth Avenue
Pittsburgh, PA 15222

DATE: April 22, 2013

cc: W. Thomas McGough, Jr., Esquire