1342

Brackbill, Robert

From: Samuel R. Marshall [smarshall@ifpenn.org]
Sent: Friday, April 19, 2013 5:02 PM
To: Brackbill, Robert
Subject: Highmark/West Penn comments
Attachments: brackbillltr2.doc

The Insurance Federation submits the attached comments.

Thanks,

Sam Marshall

04

The Insurance Federation of Pennsylvania, Inc.

1600 Market Street
Suite 1720
Philadelphia, PA 19103
Tel: (215) 665-0500 Fax: (215) 665-0540
E-mail: sammy1@ifpenn.org

Samuel R. Marshall
President & CEO

April 19, 2013

Robert Brackbill, Chief
Company Licensing Division
Pennsylvania Insurance Department
1345 Strawberry Square
Harrisburg, PA 17120

Re: Highmark's proposed affiliation with West Penn Allegheny Health System

Dear Mr. Brackbill:

This is to supplement the comments and recommendations we submitted on April 12 and June 1, 2012, as well as the testimony we provided at the lone public hearing on April 17, 2012.

Much has happened or been learned since that one hearing a year ago: Highmark has installed a new management team; it has invested considerable amounts in building a network as part of becoming an Integrated Delivery Network; it and West Penn were involved in spirited litigation, with discovery of a hidden set of books and projections; the various "absolute deadlines" Highmark has requested for the Department's decision have come and gone; the various rating agencies have continued to downgrade both Highmark and West Penn; and, most recent, the Department's consultants completed voluminous draft reports on the issues, risks and rewards this proposed affiliation presents.

Just as much hasn't happened or has yet to be learned: West Penn hasn't seen the improvements forecast by Highmark, at least in the increased patient volume that is the key to its survival; Highmark has remained evasive about its plans for continuing its contract with the other major health system in the region, UPMC, beyond its December 31, 2014 expiration; and Highmark has made no public plans for transitioning its policyholders from UPMC network availability.

Two other things haven't changed in the past year. First is the standard of review under Sections 1402 and 1403 of the Insurance Holding Company Law, 40 P.S. Sections 991.1402 and 991.1403: Will this merger or acquisition substantially lessen competition or tend to create a monopoly, with the possible offset that it will produce substantial economies of scale or increased availability of insurance?

Second is the enormity of this proposal, in size and risk: It proposes a dramatic reconfiguration of the structure of Pennsylvania's largest health insurer (and the dominant health insurer in western Pennsylvania), with the turn-around of a struggling hospital system at its core.

Given all that, we recommend the Insurance Department allow more time for public comment and a public hearing. The consultants' reports came out on April 8, with notice of today's deadline for comments published on April 13. That hasn't provided much time for considered or widespread review, and it hasn't allowed a public hearing, whether by the Department or the General Assembly. It also suggests a quick decision by the Department once the public record closes – even though the consultants' reports are themselves only drafts, suggesting they, like the rest of us, have many unanswered questions.

As the representative of insurers trying to compete with Highmark in western Pennsylvania, we appreciate the need for closure on this almost as much as the Insurance Department, Highmark and West Penn, and the consumers and patients they serve. Market uncertainty is a hindrance to potential competitors just as much as market instability is.

That said, this appears headed for a hurried decision with limited questioning. We urge the Department to avoid that trap: A few more weeks, and more transparency and accountability to the public's concerns, will make for a better decision and more public confidence in the integrity of the process. The delays to date haven't been the fault of the Department, its consultants or the public; they have been the fault of Highmark, and yet it seems to be the beneficiary of the hurried review its past evasiveness has produced.

That's a procedural recommendation, but also one aimed to ensure the substantive recommendations – from us and others – get proper consideration and scrutiny. Turning to our substantive recommendations:

1. **Highmark should state its intention to end its contract with UPMC as scheduled on December 31, 2014.**

The consultants' reports repeatedly note the risk in this proposed affiliation – whether it is realistic, and whether it can produce its touted public benefits without lessening competition. Both reports emphasize the considerable uncertainty in Highmark's projections (in many instances, that's a charitable characterization – the reports frequently find Highmark's projections lacking credibility, a significant downgrade from "uncertain"). They repeatedly acknowledge the real threat to competition and the prospect that West Penn – the core of Highmark's broader goal of becoming an IDN – won't make it.

But the reports are uniform on one thing: If West Penn is to survive, if the Highmark projections for it and its promised savings and benefits to the insurance-buying and health care-using public are to be realized, Highmark needs to make an unequivocal and immediate commitment to West Penn as the core of its being an IDN. As the reports and Highmark concede, that doesn't just mean more money and better management – it means a substantial increase in patient volume by roughly 30,000 patient admissions annually.

The reports may be correct, that this is possible. But they also realize it is a possibility best (and maybe only) realized if Highmark ends its contract with UPMC in December, 2014 and begins the quick movement of its policyholders to West Penn.

Highmark nonetheless remains evasive about its plans. As the Compass Lexecon report notes, Highmark successfully sought help from the administration and the General Assembly last year to continue its contract with UPMC, and it might do so again next year - even though its own projections show the best case scenario, for West Penn and for consumers and Highmark, is one where the contract ends next December.

The Insurance Department, on behalf of consumers, providers and competitors who need some level of predictability and stability in the health insurance and health delivery systems, should at long last say to Highmark, enough is enough.

Highmark cannot be allowed to profess a firm commitment to becoming an IDN with West Penn at its core while embarking on a business strategy – a continued contract with UPMC - that directly conflicts with that commitment. It can't be allowed to ask the Department's approval to affiliate with West Penn in 2013, while leaving the door open to asking the Department's help with its UPMC contract in 2014 – a request that would take Highmark in the exact opposite direction of the future it outlines here, of being an IDN with West Penn at its core.

Some have said this isn't a reasonable condition, and Compass Lexecon rejected this as unnecessary to protect competition (it said there were other means of doing that, although without much detail). None of that adds up: Highmark itself says its plan works best with a quick end to its contract with UPMC, and the consultants concede that its projections if the UPMC contract continues are based on an unrealistic future contract.

So everyone – Highmark, West Penn, the consultants and Highmark's competitors – agrees that the proposed affiliation works best, with the least risk, if the UPMC contract ends in December, 2014. The question isn't whether this should be a condition of any approval; it is why Highmark continues to speak from both sides on this, on the one hand saying its best case scenario is a prompt end to its UPMC contract, but on the other suggesting it will again seek a continuation of that contract.

The time has come for Highmark to be up front with the Insurance Department, West Penn and its policyholders. Its projections suggest it (and West Penn) needs a prompt end to the UPMC contract. Any order of approval should be conditioned on that.

If Highmark isn't willing to accept that condition, it should explain its reasoning. It makes no sense that having sought an affiliation with West Penn and having touted with great bravado the savings and benefits that will flow to the public by this affiliation, Highmark would nonetheless be reluctant to do all it can to make that affiliation a success. That includes ending its contract with UPMC in 2014 to ensure the success of West Penn and the new IDN.

If Highmark is unwilling to make this commitment, its commitment to West Penn and the new IDN becomes as lacking in credibility as the consultants found many of its projections – not a result the Department can allow. It also means this affiliation is of dubious financial integrity and will lead to market confusion – and in insurance, market confusion benefits the dominant insurer, not competition.

2. **Highmark should file a proposed plan for transitioning its policyholders from a network including UPMC, with regular reporting to the Insurance Department on transition updates and with benchmarks.**

From a competitive posture, certitude – or at least disclosure – of Highmark's plan for contracting with the largest health system while owning the second largest is essential. The same holds for a regulator seeking to evaluate the fiscal soundness of the underlying proposal, since Highmark's plan for contracting with UPMC is the single largest factor in whether the proposed affiliation works.

Consumers, however, have another equally compelling need, one which the Insurance Department should insist be addressed as a condition to an approval of the proposed affiliation: Highmark needs to address how it intends to transition its policyholders to its IDN, and especially how to transition its policyholders to a Highmark insurance program that no longer has UPMC in its network.

This isn't some impossible condition where Highmark has to plan for a distant and unlikely event. Just the opposite: Its own projections make a prompt end to the UPMC contract, and a prompt move of its policyholders to West Penn and other providers in its IDN, the cornerstone of saving West Penn and establishing an IDN that improves the well-being of its policyholders. Further, the consultants' reports concede Highmark will not, in any event, get a contract with UPMC along the lines it envisions; and UPMC has been adamant in saying it will not continue to contract with Highmark if and as it becomes a competing IDN whose success depends on moving its policyholders from UPMC to its own hospital system, especially West Penn.

To that extent, Highmark would be irresponsible as a business, and the Insurance Department irresponsible as a regulator, if transition plans are not filed and reviewed as part of this affiliation. The UPMC contract ends in 20 months, and the prospect of it being renewed is remote. Highmark has clearly planned for its ending in 2014 – hence its favorable projections on reviving West Penn and producing consumer savings. It realizes the current contract came about last year only as a result of the administration's intervention, an unprecedented event that Highmark, the Insurance Department and Highmark's policyholders can't expect to be repeated.

So we recommend Highmark be required, as a condition to approval of this proposed affiliation, to file with the Insurance Department its plan of transition for the end of its current contract with UPMC. That plan should set forth how and when it intends to inform its policyholders of the contract termination, how policyholders undergoing treatment in UPMC facilities will be covered, and how policyholders still seeking treatment at UPMC facilities will be covered once the contract ends.

As this will be an ongoing transition, the Insurance Department should require that Highmark set forth benchmarks on its progress of explaining the transition to its policyholders. It should also require regular reports from Highmark both before and after the December 31, 2014 end of the UPMC contract as to how Highmark policyholders – especially those receiving care in UPMC facilities – are being assisted during the transition.

A number of commentators – including some in the media and a few in the General Assembly – have said Highmark and UPMC should continue their contract beyond 2014, even as Highmark embarks on becoming an IDN with West Penn at its core, and even as Highmark and the consultants agree that West Penn can only survive with a dramatic, quick and consistent increase in patients that comes only from an end to Highmark's contract with UPMC.

We'll leave the obvious inconsistency for others to point out. Our point is that assuming a continuation of the UPMC contract is fanciful, and ignoring the need for an orderly transition irresponsible. The federal health care reforms that will be in effect at that time – with guaranteed issuance and portability for all consumers and from all insurers – make the insurance consequences manageable. Further, there will be plenty of options for consumers who want either a Highmark (or UPMC) IDN, or access to all or most facilities through other insurers.

But consumers will need certainty and knowledge well in advance of the December 31, 2014 end to the Highmark/UPMC contract. That is the only way they can make educated and rational decisions. That is also the way Highmark can best ensure the public benefits it promises, and the way Highmark and the Insurance Department can assure that this affiliation doesn't lessen competition among insurers and allows consumers to plan in advance, with full knowledge and a lack of manufactured hysteria from Highmark, for the their health care delivery and health insurance needs.

We also reiterate the recommendations we submitted before. The events of the past year have only buttressed their value in ensuring this proposed affiliation fulfills its promise and meets the standards of the Holding Company Law.

In particular, we emphasize the importance of requiring that Highmark allow West Penn to remain open to other insurers at competitive terms, and that Highmark be required to do the same for all other provider systems in its IDN. That may be an easy guarantee in the short term, because West Penn needs the patient volume from all insurers, not just the promised (if dubious) increases from Highmark.

From a competitive perspective, it is essential to guarantee this for the long term. We agree with the many, including Governor Corbett, who have said consumers and other insurers will benefit if West Penn can come through this as a viable competitor to UPMC. That holds true, however, only if Highmark does not use its control of West Penn to lock out other insurers from contracting with it (this is exacerbated if Highmark also stays in contract with UPMC, where it would be UPMC's largest insurer and therefore have commensurate influence there).

We also emphasize the importance of ongoing monitoring of this affiliation, with regular reporting to both the Insurance Department and the public. Those reports need to extend to both the finances and the efficiency and quality standards that are at the heart of Highmark's justification for this.

The consultants' reports, and the record developed in the Highmark/West Penn litigation of a few months ago, are the best evidence of the need for this. The reports repeatedly reject Highmark's projections as speculative and lacking credibility; West Penn revealed the same in the litigation. Just yesterday, Highmark's CEO spoke of the difficulty in making this affiliation work, saying he has "no illusions" of the challenges ahead.

The Insurance Department's abbreviated public comment period and the lack of even one public hearing following the past year's dramatic events (and the consultants' reports) show an unprecedented amount of trust in Highmark. We question whether that is warranted – but it certainly has to be verified as events unfold, and only regular and public reporting can assure that.

We'll offer a few closing observations. First, this is a filing where the fundamental questions and standards have often been obscured by the rhetoric, the litigation and collateral or political issues. It seems every commentator has been immediately segmented: We are pigeonholed, even before our remarks are considered, as pro- or anti-Highmark, pro- or anti-West Penn or pro- or anti-UPMC. We are either against the merger or in favor of it, and being in favor of it is seen to include being in favor of Highmark also continuing its UPMC contract past 2014.

That has been unfair to us as commentators representing competing insurers, and we suspect it is unfair to many others as well. From our perspective, we have some very simple objectives that we hope don't get lost in the hyperbole this filing has generated:

- We favor the filing to the extent it produces what it professes to produce – a vibrant West Penn that is open to policyholders of others insurers, not just Highmark, and a new Highmark operating as an IDN and creating a more varied market for consumers.

- We favor the filing to the extent Highmark is sincere in doing it – and that means a prompt and orderly end to its UPMC contract in 2014, with a meaningful transition plan. Some characterize that as "anti-Highmark" or recommending impossible conditions. That's nonsense: The conditions are those Highmark has put forth in its "best case scenario" and those the Department would ask of any insurer making a major transformation.

- We favor meaningful and ongoing accountability. The history of this filing reads like a bad soap opera, with the parties as litigious with themselves as with others. To expect harmony going forward in what all concede will be a difficult task makes no sense. Accountability (and probably regulatory counseling) will be essential; that's especially true given the short review time of the consultants' reports – the deadline has not allowed much questioning, and a quick decision won't allow that, either.

- We favor an approval that, to quote Highmark, has no illusions of the difficulty ahead – and therefore requires candor, transparency and preparation on the areas we've outlined here.

In the end, this filing comes down to a question of credibility, in terms of projections and objectives. We urge the Insurance Department to incorporate our recommended conditions to ensure the credibility of the filing, and ensure that it achieves its stated objectives while creating a health insurance market for consumers in western Pennsylvania that is more vibrant, more open and more affordable than the one they have now.

Again, thank you for the opportunity to comment. While time may be brief, we are happy to answer any questions from the Insurance Department, its consultants or others submitting comments.

Sincerely,

Samuel R. Marshall