The Insurance Federation of Pennsylvania, Inc.

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

Samuel R. Marshall
President & CEO

October 3, 2014

Stephen Johnson
Deputy Insurance Commissioner
Office of Corporate and Financial Regulation
Pennsylvania Insurance Department
Strawberry Square
Harrisburg, PA 17120

Re: Highmark's August 27, 2014 Request for Modification

Dear Deputy Commissioner Johnson:

The Insurance Federation, on behalf of its member companies, writes in opposition to Highmark's Request for Modification of the Insurance Commissioner's April 29, 2013 Approving Determination and Order.

At the outset, we are concerned the Department is considering this Request without adequate public notice and opportunity for review and comment. It wasn't published in the **Pennsylvania Bulletin**, and it hasn't been subject to a hearing – in contrast to the far more open process the Department used in reaching the Order Highmark now seeks to modify.

That same process should be in place here. Highmark's Request would result in a material change in the structure, terms and oversight of the merger allowed in the April 29, 2013 Order, not a minor adjustment or modernization (it has only been eighteen months), and it raises serious concerns about the ongoing soundness of the merger. The Department correctly allowed considerable public comment and scrutiny in its review of the original merger proposal, and it should do the same here: The changes Highmark requests are tantamount to a much different merger application and therefore merit a review as thorough and open as the original one.

Turning to the requested modifications:

Condition 3 – Provider/Insurer Payment Contract Length Limitation

Highmark seeks to limit the current five year limitation on its contracts with any Pennsylvania health care providers to only those who are subject to Highmark's control. It says it "has been advised" this was the intent in the current Order's language. Highmark doesn't disclose who gave it that advice – a question it should answer.

In any event, its Request should be rejected. This Condition is meant to apply to Highmark's contracts with unrelated providers and community hospitals; that is how the Condition reads - there is no ambiguity.

Under Highmark's Request, however, there would be no limit on the duration it could seek in contracts with unrelated providers, and this would be replaced with a relatively meaningless five-year limit on contracts with its own providers. That would contradict the intent of the current Order's Competitive Conditions; as the preamble states, the intent is to "maximize market-based access opportunities of **unrelated providers and community hospitals** to the IDN and insurers to UPE Health Care Providers."

Highmark may not like this Condition, but it is fanciful to suggest this was intended to mean something other than what it says.

Condition 10 – Limitations on Donations

Highmark wants to raise the threshold for the Department's approval of its Donations by carving out Donations made or committed to be made prior to April 29, 2013. It also wants to carve out from the definition of Donation transfers or distributions it makes to its subsidiaries.

In requesting to not include Donations made – or committed to be made, a much broader category – prior to April 29, 2013, Highmark's only argument is that it doesn't think that was the intent of this condition. In requesting to move certain Donations into (potentially) the Financial Commitments provisions in Condition 11, Highmark seems to suggest the same – that the Department's prior approval was never intended for these Donations.

The Department should reject this Request. The language in the current Order is clear. If the Department had intended something else, it would have drafted something else, or Highmark would have raised this concern long ago. If Highmark believes the Condition is outdated or too onerous, it can make that case. But there is no reason to believe the Commissioner didn't intend what this Condition's plain language requires.

Highmark is essentially requesting a reduction in the Department's review and approval of its financial movements with its AHN investment. It doesn't explain why a lesser standard is appropriate, beyond saying the Department never meant to be so thorough. The preamble to the Financial Conditions goes the other way: It states that the intent of these Conditions is for an enhanced standard of review and assessment, enhanced transparency, and ongoing reporting and monitoring.

The Department's review of Highmark's Donation (and of its Financial Commitments to AHN in Condition 11) is meant to be thorough because the underlying merger is so unusual and fraught with fiscal peril, as the Department's own experts found. If there were any ambiguity in this Condition, it would be better interpreted to require more Department oversight, not the reduced oversight Highmark requests.

Condition 11 – Financial Commitment Limitations

This Request matches that for Condition 10 and should be rejected for the same reasons: Highmark seeks to weaken the Department's approval standards in this Condition by claiming the Commissioner never intended to be as thorough and encompassing as the language in the current Order.

Again, the language in Condition 11 is clear, and nothing in it or in the Financial Conditions preamble suggests something weaker was intended. If Highmark wants to change this Condition because it finds it excessive, outdated or misplaced, it can make that argument. But the Department should reject what Highmark is attempting here, which is to say the Condition was never meant to mean what it means.

Condition 13 – Disclosure of Financial Commitments and Financial and Operational Information

Highmark wants to limit public review of its audited financial statements and their footnotes, carving out confidential, proprietary or trade secret information and the auditors' opinion tied to that.

The question is whether this is consistent with the Department's requirements for insurers generally in filing audited financial statements. To the extent Highmark seeks confidentiality treatment beyond that which the Department generally allows in the submission of audited financial statements, the request should be rejected. Further, the Department should set forth a process of reviewing any request for confidentiality from public disclosure, as it has done in laws and regulations on similar filing requirements – the decision can't rest with Highmark alone.

This may also merit greater consideration of the scope of material that Highmark could hide from public review, as it seems to apply to not just Highmark's insurance operations but all other operations.

Condition 15 – WPAHS Corrective Action Plan

This Condition requires Highmark to prepare a Corrective Action Plan for West Penn if, as of June 30, 2015, West Penn's Days Cash On Hand has been under a specified threshold in two of the previous four quarters.

Highmark now wants the Department to raise that threshold. In essence, it wants to recalculate when the Department should be alarmed – that's what requiring a corrective action plan means – by adding certain loans and grants Highmark has made to West Penn in calculating the DCOH. Highmark contends this is justified because the current threshold doesn't include some items Highmark included in its financial projections.

Highmark never explains why the current threshold is too low or is otherwise incorrect, just that it doesn't reflect projections Highmark filed with the Department prior to the Commissioner's setting this Condition.

That doesn't justify a change in the threshold. The Commissioner's Order sets a clear threshold for when Highmark is to file a corrective action plan if its WPAHS turnaround fall short of certain targets.

Eighteen months later, Highmark wants to change those targets. But it doesn't explain why those targets are too low or otherwise incorrect. Absent an explanation of why the threshold and targets in this Condition – specifically those tied to the calculation of DCOH – are proving to be wrong, the Department should reject this request.

As with many of its other requests, Highmark is seeking a change in the current Order not because events merit a change, but because it never liked the Order to begin with – and as certain dates grow closer, it wants to reargue the points again. The time to have done that has long passed.

Appendix 1 – Definition of "affiliate"

Highmark complains that the current Order has a more stringent standard of whether its affiliates control, are controlled by or are under common control than the standard in the Insurance Holding Company Law. It notes that the Holding Company Law provides a rebuttable presumption of control for certain persons (those with more than a 10% stake). It claims the Order's definition of affiliates here doesn't allow such a rebuttal.

Its recommendation, however, goes far past the Holding Company Law concept of a rebuttable presumption of control, and ignores the rest of that law's language on what constitutes control. Whether an affiliate for purposes of the Order should be held to the Holding Company Law's measure of control is a legitimate question, but it isn't the one Highmark has answered in its proposed revision to the Order's affiliate definition.

Satisfying Condition 27

Granted, the Commissioner's Order allows Highmark to seek later modifications for relief. But in doing so, it requires that Highmark set forth "the reasons for which such relief is necessary."

Highmark's Request doesn't do that. It wants alterations to some of the current Order's most significant Conditions, alterations that would materially change the terms under which the Commissioner approved its merger with West Penn. It doesn't, however, explain why its proposed changes are necessary. Instead, it says the original Conditions were never intended to read as they read.

That's not a reason for the relief and changes Highmark requests. It also highlights why a hearing would be appropriate. Each of these requests suggests something specific behind them, as Highmark presumably is contemplating certain transactions that it wants to shield from the Department's prior approval and public scrutiny or comment, or otherwise be allowed to do that which the current Order would prohibit.

Highmark avoids addressing that, almost suggesting these requests are theoretical rather than based on ongoing or contemplated contracting and financing arrangements. That doesn't add up. Neither does its Request for Modifcations, which is why we recommend the Request be denied pending a hearing and further explanation, as outlined above.

Sincerely,

Samuel R. Marshall

C: Yen Lucas, Chief Counsel