STATE OF VERMONT
GREEN MOUNTAIN CARE BOARD

In re: Blue Cross and Blue Shield of Vermont	)	
2019 Vermont Individual and Small Group Rate Filing	)	GMCB-009-18rr
	)	

OFFICE OF THE HEALTH CARE ADVOCATE POST-HEARING MEMORANDUM

The Office of the Health Care Advocate (HCA) thanks the Green Mountain Care Board (Board) for the opportunity to respond to the Blue Cross Blue Shield of Vermont (BCBSVT) 2019 Vermont Individual and Small Group Rate filing (Filing). The proposed premium price increases in BCBSVT's original May 11, 2018 filing range from 1.25% to 18.87% and will impact 54,000 Vermonters.[1] BCBSVT's July 23, 2018 amendment proposes to raise premiums further.[2] BCBSVT has failed to submit evidence supporting all factors on which the Board must make a determination, and it has not demonstrated that its proposed increase will produce rates that are affordable and not excessive. Therefore, the HCA respectfully requests that the Board reduce BCBSVT's proposed rate increase.

I. Statutory Background

BCBSVT bears the burden of demonstrating that its proposed rate meets the multi-faceted test governing the lawfulness of a rate increase in Vermont:

- whether the requested rate is affordable;
- whether it promotes quality care;
- whether it promotes access to health care;
- whether it protects insurer solvency;
- whether it is not unjust, unfair, inequitable, misleading, or contrary to law; and

[1] GMCB-009-18rr, Ex.1 at 4; GMCB-009-18rr, Ex. 13 at 291(1).
[2] The BCBSVT amendment raises the rate 3.8 points--a 24% increase over the originally filed increase--for on-exchange Silver plans and 1.6 points—a 30% increase over the originally filed increase--for all other plans. GMCB-009-18rr, Ex. 1; GMCB-009-18rr, Ex. 14.

- whether it is not excessive, inadequate, or unfairly discriminatory.[3]

Absent such a demonstration, the Board may, in its discretion, modify the proposed rate or any element of the rate.[4] When deciding whether to approve, modify, or disapprove each rate request, the Board must make a determination on each of the statutory criteria.[5] Vermont law also directs the Board to consider "changes in health care delivery, changes in payment methods and amounts …" and other issues at its discretion.[6]

Additionally, the Department of Financial Regulation (DFR) must provide the Board with an "opinion on the impact of the proposed rate on the insurer's solvency and reserves," and the Board must accept comments from both the public and the Office of the Health Care Advocate on BCBSVT's proposed rate.[7] The Board must consider the views of DFR, the public, and the HCA, but it is not bound by them. The Board is not required to consider its actuary's opinion.[8]

Finally, Vermont requires that BCBSVT meet an additional standard that applies solely to BCBSVT: BCBSVT must provide coverage not merely at rates that meet the rate review criteria but also "at minimal cost under efficient and economical management."[9]

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[3] GMCB Rule 2.104(c);.GMCB Rule 2.301(b); GMCB Rule 2.401; see also, 8 V.S.A. §4062(a)(3); In re MVP Health Insurance Company, 203 Vt. 274 (2016).

[4] E.g., GMCB-007-17rr, Decision; GMCB-004-17rr, Decision at 5 (reducing a proposed rate based on a balancing of the carrier's needs against the needs of Vermonters for affordable rates); GMCB-003-15rr, Decision at 5 (reducing a proposed rate due to a carrier failing to meet its burden of proof).

[5] 8 V.S.A §4062(a)(3).

[6] 18 V.S.A. §9375(b)(6).

[7] 8 V.S.A §4062(a)(2)(B); 8 V.S.A §4062(c); 8 V.S.A §4062(e)(1)(B).

[8] 8 V.S.A §4062(d)(1).

[9] 8 V.S.A. §4512(c) (Nonprofit Hospital Service Corporation); 8 V.S.A. §4584(c) (Health Maintenance Organization).

II. BCBSVT has Failed to Carry its Burden with Respect to each Criterion on which the Board must make a Determination.

A. Not excessive, inadequate, or unfairly discriminatory

1 BCBSVT fails to incorporate the benefits it will receive under the Tax Cuts and Jobs Act (TCJA)—the Trump tax reform law—into its rate filing.

The TCJA provides BCSVT with two major tax benefits. First, BCBSVT will pay no federal income tax going forward. Second, it will receive tax refunds in the amount of $16.6 million in 2019 and an additional $14.3 million by 2022.[10]

BCBSVT has at least arguably incorporated the federal income tax exemption beginning in 2019, by reducing its CTR from 2% to 1.5%. However, it has failed to incorporate the $16.6 million it will receive in tax refunds in 2019 into its rate filing in any way.[11]

There is no defensible rationale for not requiring BCBSVT to pass through to its policyholders at least some of the tax refund that it will receive in 2019. BCBSVT has acknowledged that a 1% CTR equals a little under $4 million.[12] Therefore, if the $16.6 million BCBSVT is to receive in 2019 were to be allocated to reducing its CTR for 2019, BCBSVT's CTR could be reduced by more than 4% (16.6/4=4.15). Based on such an allocation, the filing would incorporate a -2.5% CTR, not a 1.5% CTR.

If the Board wished to be conservative and increase BCBSVT's Risk Based Capital (RBC) ratio while still reducing the proposed rate, it could allocate only a part of the $16.6 million 2019 tax refund to reducing BCBSVT's 2019 CTR factor. One obvious choice is a 50-50 allocation: use $8.3 million of

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[10] GMCB-009-18rr, Ex. 9 at 257(23).
[11] E.g. GMCB-009-18rr, Ex. 4 at 2010; GMCB-009-18rr, Hr'g Tr. at 812, line 20-22 ("(Ms. Greene) Even though the AMT is very much a positive thing [BCBSVT] will record it and reflect it in the financials when we see it."); GMCB-009-18rr, Hr'g Tr. at 102, line 16-17 ("A. (Mr. Schultz) Well [the requested CTR] does not reflect the 16.6 million because we haven't received it yet.").
[12] GMCB-009-18rr, Hr'g Tr. at 104, line 14-15 ("A (Mr. Schultz). A point is around a little shy of 4 million dollars.").

the tax refund to reduce the CTR in the rate filing approximately 2 points to approximately -0.5%, and allow BCBSVT to increase its surplus with the other $8.3 million. This allocation makes even more sense in view of the additional $14.3 million BCBSVT will receive in tax refunds in 2020-2022. Further, such an allocation gives the Board plenty of room--in both directions--to alter the allocation of future tax refunds based on BCBSVT's actual experience.

2 BCBSVT's proposed rate is excessive because it double-counts for the deterioration of the risk pool's health status.

BCBSVT seeks to raise its rates:

- by 2% because it projects that its insured population's health status will deteriorate because of the repeal of the individual mandate penalty;[13]
- by another 2.3% because its insured population's health status will deteriorate because of increased "morbidity"; [14]
- by another 1% because its insured population's health status will deteriorate due to aging and other demographic changes; [15] and
- by another 2% because its insured population will be using more services (a logical consequence of deteriorating health status).[16]

Seeking to raise rates due to worsening health status in four different ways necessarily involves double-counting. BCBSVT admitted to one instance of double counting in the course of its discussions with L&E, and as a result of this, it has reduced its originally proposed 2.3% morbidity adjustment to 1.3%.[17] Nevertheless, BCBSVT continues to raise its rates based on increased morbidity due to the

[13] GMCB-009-18rr, Ex. 1 at 13(5); GMCB-009-18rr, Hr'g Tr. at 112, line 12-24.
[14] GMCB-009-18rr, Ex. 1 at 22(14); GMCB-009-18rr, Hr'g Tr. at 114, line 1-3.
[15] GMCB-009-18rr, Ex. 1 at 23(15); GMCB-009-18rr, Hr'g Tr. at 115, line 6-9.
[16] GMCB-009-18rr, Ex. 1 at 13(5); GMCB-009-18rr, Hr'g Tr. at 113-114.
[17] GMCB-009-18rr, Hr'g Tr. at 114-115; see also GMCB-009-18rr, Ex. 13 at 306(16).

repeal of the individual mandate penalty and multiple other factors.[18] BCBSVT's approach is in sharp contrast to MVP's filing, which incorporates the same 2% assumption for increased morbidity due to the repeal of the individual mandate penalty but does not include an additional increase for "morbidity."[19]

Regarding trend, although a theoretical basis exists for distinguishing increases due to trend from increases due to health status,[20] in practice the two are difficult to isolate. But even assuming some legitimate separation exists among the factors, BCBSVT's rate should be reduced: increasing rates by both 1.3% for morbidity and 1% for aging (and therefore increased morbidity), on top of the 2% adjustment for increased morbidity due to the repeal of the individual mandate penalty, is excessive.

3 BCBSVT's rate is excessive because the assumptions it uses to support the 2% increase it attributes to the repeal of the individual mandate penalty are unreasonable.

BCBSVT's estimate that the repeal of the individual mandate penalty will increase BCBSVT's costs by 2% is unreasonable for several reasons.[21] First, that estimate is based on the assumptions that all unsubsidized people without claims will leave, and that all unsubsidized people with claims will stay; BCBSVT itself has acknowledged that both assumptions are incorrect.[22]

Second, BCBSVT has submitted no evidence as to the extent to which its insureds knew about either the establishment of the individual mandate or its repeal. Nor did BCBSVT submit any evidence as to the extent to which the penalty--which was $95 in the first year, $325 in the second year, and $695 in the third and succeeding years--had any effect on their behavior even if they did know about

[18] See GMCB-009-18rr, Hr'g Tr. at 118-119.
[19] GMCB-008-18rr, MVP Actuarial Mem. at 5-6.
[20] See GMCB-009-18rr, Hr'g Tr. at 118-119.
[21] GMCB-009-18rr, Ex. 1, at 13(5).
[22] GMCB-009-18rr, Ex. 1, at 20(12); GMCB-009-18rr, Hr'g Tr. at 119.

it.[23] Finally, BCBSVT assumes that the 2020 Vermont individual mandate will have no impact on Vermonters' decisions to drop coverage.[24]

B. Affordability

The dictionary defines "affordability" as "the state of being cheap enough for people to be able to buy."[25] BCBSVT provides no evidence that the proposed rate will promote affordability. To the contrary, it seeks to define affordability as meaning "not excessive." Whether or not someone has enough money to buy insurance, however—including insurance sold at a non-excessive rate—does not depend on whether the rate is actuarially justified.

The baldest statement of BCBSVT's refusal to acknowledge the distinction between the actuarial standard and the affordability standard is Ruth Greene's June 28, 2018 letter to the Board in which she states that "adequate and not excessive rates are not unaffordable unless the care which the premium pays for is too comprehensive."[26] Ms. Greene's tortured definition can be viewed as either blaming the victim for not having enough money to afford BCBSVT's proposed increase, or blaming the government for requiring insurers to provide care that is "too comprehensive." The one entity it seeks to absolve from any blame is BCBSVT. The Board should expressly reject BCBSVT's proposed definition of affordability, and find that BCBSVT has provided no evidence tending to demonstrate that its proposed rate would be affordable.

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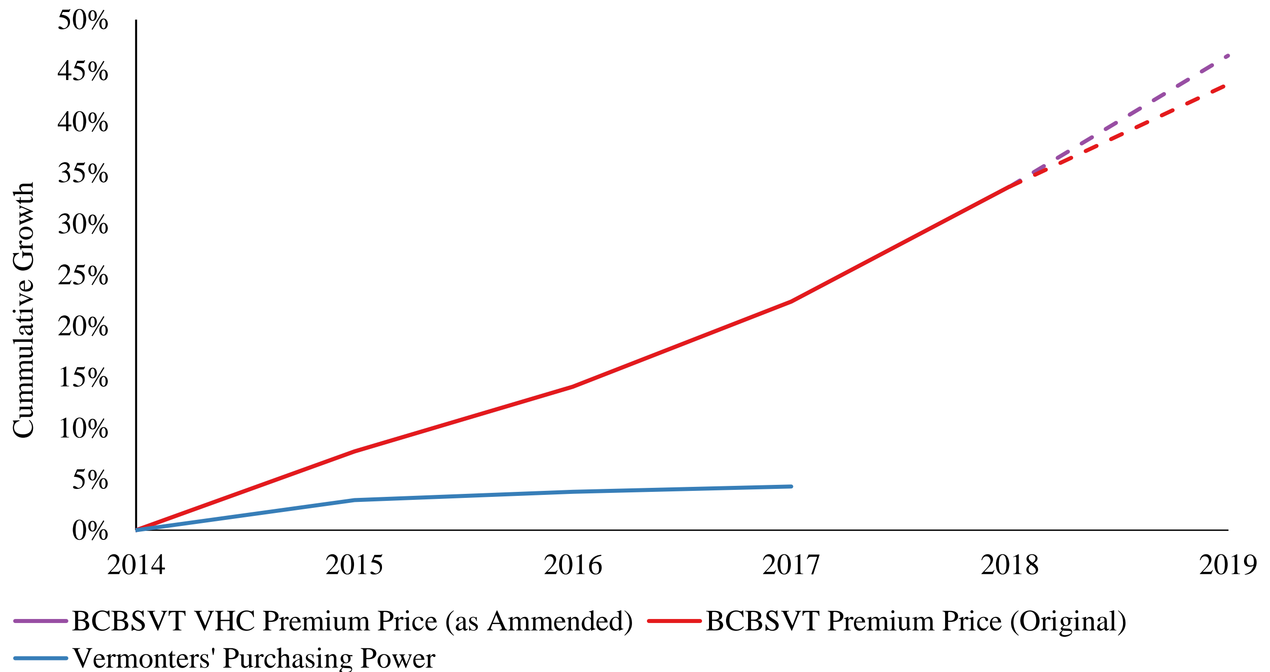
[23] H.R. 3590 – 111th Congress: Patient Protection and Affordable Care Act, Sec. 5000A(c)(3).
[24] GMCB-009-18rr, Hr'g Tr. at 189 ("(Mr. Schultz) I don't think the Vermont mandate effective in 2020 will have an impact on 2019.").
[25] Cambridge Dictionary Online, Definition of "affordability," https://dictionary.cambridge.org/us/dictionary/english/affordability.
[26] GMCB-009-18rr, Ex. 9 at 253(18).

1. A measure of BCBSVT rate affordability.

BCBSVT's rate increases for this book of business have far outpaced Vermonters' purchasing power. Between 2014 and 2017, its VHC premium price growth was 520% larger than Vermonter purchasing power (VTPP) growth.[27]

Chart 1. BCBSVT VHC premium price growth compared to VTPP growth.[28]



The ACA premium affordability threshold and Vermont's Household Health Information Survey deductible affordability standard provide a quantitative measure of the dual burden on Vermonters of paying premium and deductible. Specifically, a plan is affordable if a household (1) does not pay more than 9.56% of their income for premiums or (2) have a combined deductible greater than 5% of their

[27] VTPP, as opposed to nominal wages, accounts for inflation. Vt. Dept. of Labor, QCEW Average Wage Data, http://www.vtlmi.info/indnaics.htm#mqa; U.S. Bureau of Economic Analysis, CPI-U Northeast region, https://data.bls.gov/timeseries/CUUR0100SA0?amp%253bdata; GMCB-009-18rr, Ex. 1; GMCB-008-17rr, Decision; GMCB-008-16rr, Decision; GMCB-008-15rr, Decision; GMCB-018-14rr, Decision.
[28] Id.

income.[29] Using this test, the current BCBSVT Standard Silver plan is unaffordable to large numbers of Vermonters. It is unaffordable, accounting for premium subsidy and cost-sharing benefits, to individuals whose annual income is between $18,091 and $18,891 or between $24,121 and 70,382. It is unaffordable to couples whose annual income is between $24,361 and $140,768. And it is unaffordable for families whose annual income is between $49,201 and $197,779.[30] The proposed rate increases will mean that the 2019 BCBSVT Standard Silver plan is even more unaffordable.

The plan is particularly unaffordable for Vermonters whose income is slightly above the premium tax credit threshold. Individuals, couples, and families at 401% FPL in 2017, the applicable year used to calculate 2018 premium tax credits ($48,361, $65,122, and $98,646, respectively), must pay 20%, 30%, and 26% of their income, respectively to pay their premium and meet their combined deductible.[31]

Vermonters' public comments describe their struggle to pay premium prices and afford medical care on the individual and small group market.[32]In Vermont, the standard silver plans are unaffordable to the 2016 median income individual ($28,069), couple ($67,404), and family of four ($89,824).[33] The

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[29]Internal Revenue Service, Rev. Proc. 2017-35; Dept. Fin. Regulation, 2014 Vermont Health Insurance Survey Research Findings, 42, http://hcr.vermont.gov/sites/hcr/files/pdfs/survey/2014-VHHIS-Legislative-Presentation.pdf (2015).

[30] The assumed family composition is two adults and two dependent children under 19 years of age. 2017 Federal Poverty Guidelines, 19 Fed. Reg. 82, 8832 (Jan. 3, 2017); 2018 Federal Poverty Guidelines, 12 Fed. Reg. 83, 2643 (Jan. 18, 2018); Vermont Health Connect, 2018 Plan Designs & Monthly Premiums (2017); Vermont Health Connect, 2018 Silver Plan Designs with Cost-Sharing Reduction (2017); Vermont Health Connect, Medicaid & Dr. Dynasaur, http://info.healthconnect.vermont.gov/Medicaid; Vermont Health Connect, 2018 Silver 94 Plans (2017); Vermont Health Connect, 2018 Silver 87 Plans (2017); Vermont Health Connect, 2018 Silver 77 Plans (2017);; Vermont Health Connect, 2018 Silver 73 Plans (2017).

[31] Id.

[32] E.g. Sean Stephens, Pub. Hr'g Tr. at 48 ("My son asked me should I call 911, and as I was writhing around in a pool of my own blood I had to tell him, 'no don't call 911. We can't afford it.'"); Meghan Gardner, Pub. Hr'g Tr, at 11; Avery Brook, Pub. Hr'g Tr. at 15; Christine Birong-Smith, Pub. Comment, July 25, 2018; Samantha Lengevin, Pub. Comment, July 20, 2018.

[33] 2016 is the most recent year for which the U.S. Census Bureau produces estimates. U.S Census Bureau, 2016 American Community Survey 1-Year Estimates, Table B19019 – Median Household Income in the Last 12 Months by Household Size.

proposed rate therefore cannot reasonably be said to be "affordable" within the meaning of the rate review statute.

2. *"Silver stacking" and affordability for subsidized Vermonters.*

BCBSVT's plain language statement claims that its increase other than that for Silver Level Exchange Plans is the "increase that will actually be experienced by Vermont individuals and small businesses."[34] Similarly, L&E states that due to increases in premium subsidies from the federal government, increased premium to Silver Level Exchange Plans will largely not be "felt by Vermonters." In fact, however, individuals who receive premium subsidies must pay out of pocket for any difference between the cost of their plan's premium and the second lowest cost silver plan. Therefore, the impact of on-exchange silver plan cost increases on Vermonters depends on the range of plan prices among on-exchange silver plans. If the Board's decisions increase the premium costs for the more expensive silver plans (largely BCBSVT) more than it increases the costs of the two lowest cost silver plans, many BCBSVT members who receive premium subsidies will have higher out of pocket costs.

C. Access to Care

One of the fundamental measurable indicators of access to care is Vermonters' ability to pay for needed care. The evidence in the record indicates that Vermonters cannot afford premiums and medical care. Such lack of affordability directly impedes Vermonters' access to care.[35] Because the proposed rate cannot reasonably be said to be "affordable", the proposed rate does not promote access to care.

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[34] GMCB-009-18rr, Ex. 1 at 45.

[35] E.g. GMCB-008-18rr, HCA Post-Hearing Memorandum, at Section B; Kevin Wagner, Pub. Tr. at 36 ("The high deductible we pay for our plan like every time we need care it's a matter of we're going to be paying for it for months in the future, and that's – it's definitely a barrier for us and it does cause us to like restrict the care that we seek…"); Grace Beninson, Pub. Hr'g Tr. at 29 ("I had a high deductible plan and wasn't able to afford to go to the doctor… "); Cathy Steven, Pub. Comment, July 23, 2018 ("We have had to make decisions to NOT go for care because we couldn't afford it, even on a nice income.").

D. Quality of Care

BCBSVT has not demonstrated that the proposed rate promotes quality care. The evidence before the Board demonstrates that the proposed rate does not promote quality care. For instance, BCBSVT failed to encourage a large number of its members to use preventive care—between 69.5% and 71.4% of its members did not receive a preventative care visit in the last four years [36]—and there is no evidence as to how the proposed rates will remedy this issue.

E. Solvency

It is uncontested that BCBSVT is currently within its target RBC range.[37] As BCBSVT stated, its current RBC level is more than a hundred points above the level where the Blue Cross Blue Shield Association takes action.[38] Commissioner Pieciak also stated that BCBSVT's RBC level is above DFR's "no action" level.[39] Further, as the Board noted in last year's BCBSVT VHC rate filing decision, BCBSVT's "RBC has regularly fluctuated within the full span of its 500% to 700% target range for the last decade. In addition, should MVP continue to grow its QHP membership as projected, BCBSVT's membership will inevitably decrease, and will require smaller reserves to cover the reduced number of lives."[40] Because BCBSVT's RBC level is above the action level of both DFR and the Blue Cross Blue Shield Association, and BCBSVT's membership has decreased, the proposed rate will not materially affect BCBSVT's solvency.

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[36] GMCB-009-18rr, Ex. 9 at 255(18).
[37] E.g. GMCB-009-18rr, Hr'g Tr. at 234.
[38] Id. at 152.
[39] Id. at 234, 242.
[40] GMCB-008-17rr, Decision at 12.

F. Not unjust, unfair, inequitable, or misleading

The evidence BCBSVT has introduced indicates that the proposed increase is unjust, unfair, inequitable, and misleading in at least four ways. First, as described in Section A above, although BCBSVT will receive $16.6 million in tax refunds in 2019 under the Trump tax bill, BCBSVT has not reflected that $16.6 million in its rate filings in any way.[41]

Second, BCBSVT's amendment is procedurally improper. Neither the rate review statute nor the Board's rules allow for an amendment to a filing. While the Board may choose to apply its discretion and accept filing amendments, there should be a high bar for what justifies any amendment after the original filing date. Moreover, a last minute amendment that increases rates should only be allowed under a showing of both imminent and substantial harm and that the carrier was unable to file the amendment any earlier due to no fault of its own. A change in law or policy after the original filing date should not be a blanket invitation for the Board to incorporate amendments at any time the insurer chooses to submit them.

Third, accepting the amendment would set a bad precedent. If implemented, the AHP component of the amendment would allow BCBSVT to charge Vermonters more due to the federal AHP regulation while BCBSVT is actively trying to capitalize on this new market.[42] In addition, the amendment would reward BCBSVT with a higher rate for filing an eleventh-hour amendment that denies the Green Mountain Care Board, the HCA, and the public the ability to sufficiently review and respond to BCBSVT's full rate request.[43] While BCBSVT did not have the June 19, 2018 final AHP rule before it filed its original filing, it should have reasonably been able to submit the amendment well

[41] GMCB-009-18rr, Ex. 1.
[42] GMCB-009-18rr, Hr'g Tr. at 147, line 3-9.
[43] GMCB-009-18rr, Ex.1 at 45-46.

before the hearing. BCBSVT admits to waiting to file the amendment until after it could review L&E's recommendations.[44]

Fourth, the amendment promotes bad policy by prematurely fragmenting the single risk pool. Vermont has been a leader in supporting a strong individual and small group risk pool. The effect of the federal AHP rule in Vermont is still largely unknown, forcing BCBSVT to include a large number of assumptions in its estimate. MVP said they cannot predict at this time how AHPs will impact the individual and small group market.[45] In conjunction with the release of its emergency AHP rule on August 1, 2018, DFR stated that "at present time, it is impossible to quantify the impact that fully-insured AHPs will have on premiums in VHC."[46] Increasing individual and small group premiums now based on possible competition with AHPs will make individual and small group plans less competitive against future AHP plans. In light of the insufficient information available, it is patently unjust for BCBSVT to ask the Board to rush to institutionalize the theory that competition from AHP plans--competition BCBSVT plans to create and benefit from--will lead to significantly higher premiums for the individual and small group market.[47]

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[44] GMCB-009-18rr, Hr'g Tr. at 143, line 8-9.

[45] E.g. GMCB-008-18rr, Hr'g Tr. at 80-81, ("We don't have enough data at this point to actually put a number to how much this is going to impact our rates.").

[46] Vermont Secretary of State, Fully-Insured Multiple Employer Welfare Arrangements and Association Health Plans, Department of Financial Regulations, Rule Detail, August 1, 2018.

[47] E.g. GMCB-009-18rr, Hr'g Tr. at 147.

III. Conclusion

BCBSVT has not demonstrated that the proposed rate is affordable, promotes access to care, promotes quality care, is not unfair, unjust, inequitable or misleading, and is not excessive, inadequate, or unfairly discriminatory. BCBSVT has also not demonstrated that it has complied with its statutory mandate to provide plans at minimum cost and under efficient management. As a result, we respectfully request that the Board recalculate the proposed rate as follows:

- Reduce BCBSVT's CTR from 1.5% to a maximum of -0.5%, based on incorporating half of the $16.6 tax refund to reduce premium rates and allowing BCBSVT to increase its surplus by $8.3 million;
- Reduce BCBSVT's rate to eliminate double counting for increased morbidity;
- Reduce BCBSVT's assumption regarding the impact of the repeal of the federal individual mandate penalty to account for the enactment of Vermont individual mandate and to the extent to which BCBSVT's assumptions are not backed by sufficient data;
- Increase affordability and access to care, while at the same time keeping the rate within an acceptable actuarial range, by setting BCBSVT's medical, prescription, and utilization trends at the 25th percentile of L&E's assumed actuarially reasonable ranges;
- Incentivize BCBSVT to negotiate stringently with providers by reducing the proposed rate increase by an additional 1%. The Board may also wish to consider limiting hospital budget increases in recognition that both insurers and providers share the responsibility for cost reduction/containment;
- Disallow BCBSVT's amendment as it is unfair and misleading. The amendment sets bad policy and is procedurally improper: (1) BCBSVT seeks to preemptively fragment the market, (2) BCBSVT intends to benefit from the AHP market, and (3) BCBSVT had ample opportunity to submit the amendment in a timely fashion that would not have been unfair and misleading;

Recalculating the rates as proposed, will not fully address the challenges Vermonters face due to raising premium prices and deductibles. The recalculation, however, will mitigate the harm to Vermonters of the proposed rate increase. Further, such a recalculation would reflect a balancing of all the factors the Board is statutorily charged to consider. Lastly, such a recalculation would better align BCBSVT's rate growth with Vermont's 3.5% annual health cost growth target under the all-payer model.

Dated at Montpelier, Vermont this 3rd day of August, 2018.

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CERTIFICATE OF SERVICE

I, Kaili Kuiper, hereby certify that I have served the above Memorandum in Lieu of Hearing on Judith Henkin, Green Mountain Care Board General Counsel; Sebastian Arduengo, Green Mountain Care Board Staff Attorney; Agatha Kessler, Green Mountain Care Board Health Policy Director; and Jacqueline Hughes, BCBSVT's designated representative, by electronic mail, return receipt requested, this 3rd day of August, 2018.

/s/ Kaili Kuiper

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