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-09-18-rr
)

BCBSVT POST HEARING MEMORANDUM OF LAW

Blue Cross and Blue Shield of Vermont requests the Board approve its 2019 Vermont Individual and Small Group Rate (VISG) filing as amended. As amended, BCBSVT's average requested rate increase would be 9.6 percent.[1] BCBSVT opposes any further adjustments by the Board.

BCBSVT Findings of Fact

1. Affordability. Vermont is among the 10 most affordable states in the union in terms of premiums for the average individual purchaser.[2] Tr. p. 67. Affordability, while a new consideration added to law in 2011, was already a part of BCBSVT's mission. B. p. 236; Tr. 69. Affordability reflects the adoption of the triple aim by the Vermont Legislature (and subsequently the Board) in 2011, Act 48 and must be viewed within the context of the applicable laws as it has never been defined by the Board. The rates as filed are as affordable as possible without compromising access to quality care and within the existing legal and regulatory framework. B. pp. 235-253; Tr. p. 69 and passim.

BCBSVT has maximized affordability by lowering costs in a number of ways. BCBSVT filed rates have a projected loss ratio of 91.8 percent, meaning that its combined administrative expenses and contribution to policyholder reserves (CTR) are 8.2 percent, nearly 60 percent

[1]The actual impact that will be experienced is a 6.9 percent increase due to "silver loading." Binder p. 16 provides an explanation of silver loading and reflective plans under 2017, Act No. 88 (Adj. Sess.) Tr. 52.
[2] 3-to-1 age rating, found in nearly every other state, and pure community rating, as in Vermont, are equivalent at about age 52. At that age, Vermont is among the 10 most affordable states for an individual to purchase health insurance.

lower than the federal and Vermont maximum of 20 percent. Tr. p. 65. Among Blue Cross plans nationally, BCBSVT has "by far one of the smallest amounts" of administrative expenses for the small group and individual market, among the lowest 5 percent nationally. Dillon, Tr. p. 293. BCBSVT files the minimum long-term CTR required to maintain surplus within the target range mandated by the Vermont Department of Financial Regulation (DFR). B. 180-183. While BCBSVT does not have complete control over health care expenditures, it takes action to maximize affordability through cost containment without compromising access to care. BCBSVT negotiates with providers as diligently and effectively as possible without compromising access to care by terminating large providers from the network for refusal to negotiate. Tr. p. 162. BCBSVT essentially pays for itself through its care management and fraud, waste and abuse (FWA) efforts that save roughly 8 percent of premium (administrative expenses are less than 7 percent of premium). Tr. 64-5. New BCBSVT rate mitigation efforts have decreased 2019 rates by 4.2 percent, or approximately $16 million. Tr. 69.

In each of the last two BCBSVT filings, the Board has reduced rates under the rubric of affordability instead of fully funding an adequate rate. With those reductions, rather than relying on federal[3] and Vermont subsidies which the Board has implicitly found to be inadequate, the Board has effectively ordered BCBSVT to use policyholder surplus for the inevitable funding shortfall. BCBSVT maintains surplus for all members and does not subsidize members in one market at the expense of other members. The Board's failure to act to correct the federal defunding of CSR payments for 2018 QHP is, in effect, a $7 million subsidy of 2018 QHP rates at the expense of BCBSVT's entire book of business. Underfunded rates in any line of business depletes surplus that is required to support all lines of business. DFR has determined that

[3] HHS has indicated that APTC and cost sharing reduction programs are intended to make rates more affordable for consumers. See, e.g., 78 FR 15410, at 15411, 15412, and15514

BCBSVT should not cross-subsidize among its lines of business. Tr. 249. BCBSVT files rates that are intended to avoid cross-subsidies, but the Board's orders have resulted in depletion of reserves which impacts BCBSVT's ability to serve other Vermont markets in the future. Tr. 73-4. The Board does not have the authority to require a cross-subsidy absent an express legislative mandate. Vermont has not enacted legislation mandating an insurer subsidization of the individual and small group market through the use of reserves. Any such express authority to cross-subsidize must not violate the Vermont Constitution's Common Benefit clause, Art. 7. Nor can Board rate actions be confiscatory.

2. Protection of BCBSVT Solvency. The Board must protect BCBSVT's solvency. 8 V.S.A. § 4062, 4512 and 18 V.S.A. § 9375. The Board itself acknowledges that it "must protect insurers' solvency by finding that the approved rates are adequate to cover their costs of paying for members' claims and for administering the plan [and that] the failure to meet [this] standard imperils Vermonters' access to care [if BCBSVT is no longer able or willing to participate in the market]." See, *3rd Quarter 2018 Large Group Rating Program*, GMCB Docket 04-18-rr, p. 5; and 2018 QHP decision, (unnumbered) conclusion of law, GMCB Docket 8-17-rr p. 10. Solvency and affordability are not in conflict. B. 251-3. DFR considers solvency to be the most fundamental aspect of consumer protection. B. 312; Tr. p. 228.

BCBSVT's relative financial condition has deteriorated steadily since 2014, the year the GMCB began its exclusive authority over the review of VISG rates and insured large group market factor filings. B. 311; Tr. passim. BCBSVT's RBC position is now close to the bottom of the range that BCBSVT's solvency regulator has established as the reasonable range. B. 316; Tr. 260. DFR Commissioner Pieciak warns that "any departure from the filed rate should be made with great caution," citing the downward RBC trend and unprecedented federal health policy uncertainty, id., p. 314-5, in addition to the usual threats to solvency, id. p. 313.

The year-end 2017 stand-alone VISG RBC calculation of 336 percent means that surplus and/or gains from other lines of business have buoyed BCBSVT through unprecedented VISG underfunding. B. 283. BCBSVT has lost $15 million on QHP business from 2014 through 2017. B. 182. BCBSVT's actual CTR results were an overall average of -1.2 percent and ranged from 1.0 percent to -3.2 percent. B. 14. BCBSVT has lost nearly $7 million due to the defunding of federal cost sharing reduction (CSR) payments.[4] Tr. 49-50. BCBSVT has, in this filing, continued its long-standing practice of not increasing CTR to offset past losses. These ongoing, material, negative financial results are not sustainable. Tr. 71, 73.

3. Alternative Minimum Tax (AMT) Credits. BCBSVT opposes any rate adjustment using the potential future AMT refund because that refund, not expected for at least 17 months, may not be received until after year-end 2019 (the year-end covered by the filing), is not guaranteed, and any adjustment would effectively cause BCBSVT to spend money it does not have and may not receive. The Commissioner cautioned the Board that receipt of those funds is not a certainty. Tr. 238. Spending the yet-to-be received AMT refund now is unduly risky in a system that is notoriously unstable. Tr. passim.

The Commissioner ordered use of a "permitted practice" in early 2018 to exclude the anticipated AMT refund from statutory financial statements. Tr. 238. Without that order, BCBSVT's financial statement would be "misleading and overstated." Id. Pretending BCBSVT has the full refund now puts BCBSVT solvency at even greater risk if BCBSVT does not get the full refund due to changes to the federal law (characterized by the Commissioner as an "unintentional windfall") Tr. 242, federal sequestration, Tr. 81, or other unknown factors,

[4] Even though the Board had an estimate from its actuary, 2018 QHP L&E Opinion, p. 3, of the impact on rates that would occur should CSR defunding occur, the Board refused to reopen last year's QHP rate filing to affirmatively address the 2 percent impact.

especially given the animus and volatility of funding transpiring on the federal level toward ACA related markets and issuers. Tr. 81.

David Dillon of Lewis and Ellis (L&E), the Board's actuary and consulting actuary for 22 different states on QHP filings since the advent of QHPs, has reviewed more than 900 filings and has never seen a company include a specific line item targeting or spending a particular amount of surplus, as that "is not [an] actuarial [standard of] practice in terms of how to rate. It is typically [addressed] through the CTR process." Tr. 286. BCBSVT management did consider the AMT credits in selecting a CTR of 1.5 percent. B. 181-182.

The Board has already ordered that BCBSVT deplete reserves in anticipation of a portion of this potential future refund by lowering rates in the 3rd Quarter 2018 Large Group Rate filings for large groups buying coverage from BCBSVT and its subsidiary The Vermont Health Plan, LLC, GMCB Dockets 3-18-rr and 4-18-rr, based on the Board's assumptions that the amount and receipt of the AMT refund is a certainty and that no additional material negative financial events will occur. The Board's assumptions in those dockets have already put BCBSVT at heightened financial risk. Ordered spending of more of that future refund is riskier still. BCBSVT, L&E and DFR are all in agreement that neither the AMT refund amount nor the timing of the refund nor that the refund will actually be made is a certainty. B. 180-181, 315; Tr. 81, 111, 243, 286. BCBSVT has committed to return any refund received through appropriate rate mitigation for current or future policyholders, potentially including restoration of its reserves to an adequate level for losses, such as the $7 million lost through CSR defunding in late 2017. Tr. 243-4. The use of the potential AMT refund would be in effect subsidization of the 2019 VISG rates with money BCBSVT does not have and may not receive, and that was not raised by VISG policyholders in the first place, given the net financial loss over the lifetime of these products. BCBSVT is a nonprofit, non-stock company and cannot simply raise capital by selling stock to get itself out of a financial free-fall if the Board guesses incorrectly. Tr. 239.

4. Actuarial considerations

L&E provided the Board with opinions on all rate filing factors, including the July 18 amendment (Ex. 17),[5] L&E found that all factors, after amendment, were reasonable and met all actuarial standards applicable to the filing. L&E July 10, 2018 opinion, B. 291-311 and L&E July 31 Opinion Addendum on BCBSVT Amendment (hereinafter Adm.).

a. Medical and Pharmacy Trend.

The Board selected a medical utilization trend[6] for the 2018 QHP filing that was lower than the best estimate of its actuary and of BCBSVT. GMCB Docket 8-17-rr decision, finding of fact 44, p. 8; Tr. 54. BCBSVT has another year of experience to evaluate its utilization trend and the lower trend selected by the Board proved to be too low, and results in a $ 4 million shortfall, as well as requiring an increase in this year's trend to reestablish an actuarially reasonable assumption. B. 12 and 293-6; Tr. 54, 190.

BCBSVT has filed a 2.0 percent utilization trend assumption. This matches L&E's best estimate and is reasonable and appropriate. B. 296. Despite publishing an "estimated range" of 1.6 percent to 2.4 percent, L&E would not have filed a 1.6 percent utilization trend and does "not believe it is that likely." Tr. 281. BCBSVT is working with providers and OneCare Vermont to implement cost containment measures that will lower 2019 utilization trend to 0.9 percent, which is several standard deviations below L&E's range of 95 percent likelihood. B. 30. Tr. 276.

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[5] In its amendment, BCBSVT adopted every L&E recommendation. See Exhibit 17, pages 17-1-17-4.

[6] When the Board orders a reduction of the best estimate of a trend to be used in a premium rate, that does not "set the trend" for the filing, but rather establishes the Board's opinion as to where it expects the trend to develop in the time period covered by the filing. Cf. Tr. p. 149. If the Board's selection is incorrect, the trend factor modified will not be accurate and the premium will be inadequate to cover the services consumed. In the absence of variances in other rating factors that make up the shortfall, the resulting rate will be inadequate. If the Board actually means to set a trend, it must create a means of reducing the use of necessary covered medical services consumed by BCBSVT policyholders or must prevent the payment of providers for such services. It could accomplish this by ordering BCBSVT to stop paying for certain services or by instructing providers to stop providing (or charging for) certain services. Absent a mechanism that stops the utilization of medical services or payment for such services utilized, the trend factor approved remains an estimate of what the rate of medical service utilization is likely to be during the rating period. If that estimate is too low, the resulting rate inadequacy must be funded out of surplus. Tr. p. 50.

BCBSVT needs no further motivation from the Board with respect to utilization trend, as the projected 2019 trend is already far below the low point of L&E's estimated range.

BCBSVT's assumptions on unit cost trends are based on information that was available at the time of the May 11, 2018 filing. Hospitals filed their 2019 budget proposals in July, 2018. Some of those hospital budgets deviated from BCBSVT's assumptions in the rate filing. Reflecting hospital budget submissions and the results of other known contracting efforts would require a 0.33 percent increase in unit cost trend, primarily due to UVMMC's failure to follow through on their public pledge to the Board to hold its commercial rate increase to zero. Tr. 60-1. BCBSVT expects the Board to hold hospitals to the previously announced increases, including UVMMC's commitment to the Board of a 0.0 percent commercial rate increase; otherwise, BCBSVT's assumed cost trend will be inadequate.

BCBSVT filed a pharmacy trend of 13.3 percent. B. 33. L&E found this trend to be reasonable and appropriate, and equal to L&E's best estimate. B. 298. BCBSVT has worked closely with its pharmacy benefit manager to negotiate improved pricing and to generate enhanced rebates. B. 13. These actions decreased rates by 2.3 percent and reduced effective pharmacy trend to 9.9 percent, again substantially below L&E's best estimate. Tr. 48-49. Tr. 56.

b. Effect of repeal of the individual mandate on January 1, 2019. DFR and the GMCB through L&E studied and estimated the impact on the 2019 VISG market rates of repeal of the federal individual mandate penalty. The estimated impact requires a 1.6 to 2.4 percent increase of 2019 VISG rates for both VISG carriers.[7] BCBSVT independently assessed the impact and estimated that BCBSVT VISG rates would increase 2.2 percent due to the particular characteristics of the BCBSVT VISG population. L&E found that BCBSVT's calculation was

[7] http://gmcboard.vermont.gov/sites/gmcb/files/Individual%20Mandate-%20impact%20in%20Vermont.pdf

reasonable, even if a Vermont penalty begins in 2020. Tr. 284. There was no countervailing evidence introduced.

c. Amendment necessitated by several laws adopted after the filing. Two laws and two rules were enacted after the May 11, 2018 filing[8] necessitating an amendment so that the 2019 VISG rates were not inadequate. Tr. 36. Tr. 290. The amendment adjusts for the re-introduction of AHPs[9] as well as pricing for two Vermont legislative post-filing enactments (expansion of breast imaging mandate[10] and lowering co-payments for chiropractic services[11]). BCBSVT has calculated the impact of these new laws and rules on the remaining VISG pool to be an increase of 2.2 percent, after related adjustment for claims, administrative expense, risk adjustment, and related taxes and fees. Exh. 17; Adm. BCBSVT's AHP amendment is supported, reasonable and appropriate. Adm. p. 3.

3. Additional Triple Aim Standards: Promote Quality, Promote Access to Care

BCBSVT VISG plans[12] promote the triple aim. BCBSVT has a broad, robust provider network to serve VISG members, B. 243; is subject to and complies with Rule 9-03 *Consumer Protection and Quality Requirements for Managed Care Organizations* (including geo-access and wait-time standards, emergency hold-harmless; pharmacy program standards); credentials its

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[8] Historically, the federal and Vermont governments have refrained from making late changes impacting rates that have already been filed. That has unfortunately no longer been the case in either of the last two years. L&E testified that it was reasonable for BCBSVT to file this amendment given the circumstances. Tr. 290.

[9] On June 21, 2018, the U.S. DOL issued a final rule, at 83 FR 28912, that permits group health plan enrollments through association health plans (AHPs). Prior to January 1, 2014, groups with enrollments through associations made up a large part of the small group market and BCBSVT's small group business. Exh. 17; July 24 response letter to L&E, p. 1. Associations were no longer permitted to enroll or renew small group members after January 1, 2014, under the Affordable Care Act and Act 48. The federal AHP rule allows avoidance of some consumer protections and rating rules that otherwise apply to the small group market. The final rule permits AHPs to begin enrollments September 1, 2018 with organizational and operating rules that are more relaxed than existed pre-2014. In response to the federal rule, DFR adopted an emergency rule on August 1, 2018 to regulate the re-introduction of AHPs to Vermont. http://www.dfr.vermont.gov/press-release/dfr-implement-emergency-rules-response-us-dol-greatly-expanding-association-health; the DFR emergency rule was issued August 1, 2018: http://www.dfr.vermont.gov/sites/default/files/dfr-association-health-plan-emergency-rule-i-2018-01-e.pdf

[10] 2017, Act 141, (Adj. Sess.); signed by the Governor May 21, 2018; effective January 1, 2019.

[11] 2018 Special Session, Act 7, § 1; signed by the Governor June 15, 2018; effective January 1, 2019.

[12] BCBSVT VISG plans have been approved by DFR and will be approved by DVHA prior to sale so they are not unjust, unfair, inequitable or misleading.

providers, B. 241; has been National Committee on Quality Assurance (NCQA) accredited for its QHP plans since 2013, B. 241 (NCQA health plan standards); has a robust care management program with above national average engagement leading to 25 percent lower costs, B. 247-250; Tr. 96); has price transparency tools, B. 268; has cost sharing calculators, B. 268; has award winning customer service; B. 242; is the only non-government participant in OneCare, B. 245; has an effective Fraud Waste and Abuse program, B. 28, Tr. 64-5; 186-7; added significant cost containment savings of $ 4.1 million, beyond the $22 million of savings already realized in the experience period which are embedded in its VISG rate filing, B. 30, (L&E) 297, 300, Tr. 181; 222; has an automated prior authorization system, Tr. 99; collaborates with Vermont Collaborative Care to deliver integrated physical and behavioral health services, Tr. 95-6; BCBSVT VISG plans provide all Essential Health Benefits (EHBs) and are approved by Department of Financial Regulation, B. 254; covers all federal and state mandates.

BCBSVT is a leader and on the cutting edge of every type of health reform and cost containment experiment happening in VT. In addition to its contract with OneCare for the VISG population, BCBSVT participates in, and in some cases is the only participant in, value-based payment programs such as DRG, per diem payments, case rate payments, episode of care, SBIRT, Hub and Spoke, Feedback Informed Treatment, B. 243-247, patient readmission pilot, Tr. 46, 172-3. Payment reform initiatives require startup and on-going capital. Depleting BCBSVT surplus will mean BCBSVT must curtail or be unable to participate in important health care reform efforts due to lack of capital. BCBSVT has, at its expense, supported Vermont Health Connect (VHC) behind the scenes so that VHC enrollment and plan management are seamless; B. 259, Tr. 51, and is currently working with VHC and MVP to assure consistent messaging on reflective silver plans and the benefits of maintaining coverage despite the repeal of the individual mandate penalties. Tr. 215-6; B. 229-30; 269. BCBSVT is an active participant in state working groups assessing Vermont responses to new federal actions and

maximizing federal subsidies through the 1332 waiver program. Tr. 66. BCBSVT is an active participant in state working groups developing messaging in response to the repeal of the individual mandate penalty. Tr. 215-6; B. pp. 229-30;

BCBSVT CONCLUSIONS OF LAW

1. BCBSVT has met its burden by proving that all factors included in the rate filing and amendment meet all standards applicable to the filing. BCBSVT has demonstrated that the rates filed, including the amendment, meet all actuarial standards and are not inadequate, excessive, unfairly discriminatory or unreasonable with respect to the benefits provided. BCBSVT has also amply demonstrated that the rates as amended meet the statutory standard of affordability, promote quality care, promote access to health care and will protect its solvency. BCBSVT has gained approval for all plan documents from DFR so, in addition to the hearing testimony, the amended rate filing, as well as all evidence produced in written form, BCBSVT's rates and forms are not unjust, unfair, inequitable, misleading or contrary to the laws of Vermont. Under Vermont law, the GMCB cannot disapprove or modify the filing unless it finds the rates do not meet the applicable standards. The record establishes that BCBSVT has more than met its burden and there is no evidence in the record to the contrary.

2. The Board must protect BCBSVT's solvency. The Board "cannot reasonably expect our insurers to continue to voluntarily participate in the health benefit exchange if it imperils their financial stability." 2018 QHP Decision, unnumbered conclusion of law, GMCB Docket 8-17-rr, p. 10 "We see no wisdom in sacrificing Vermonters' access to health insurance coverage, the company's solvency, or its continued ability and willingness to offer plans on the Exchange, by making unfounded cuts to rates that meet actuarial standards, in favor of short term gains in affordability." 2017 QHP Decision, p. 10, GMCB Docket 8-16-rr.

3. Lowering QHP rates based on the future promise of an estimated federal (AMT) tax refund that is not anticipated to be received, if at all, until late 2019 or early 2020 would be arbitrary and capricious, confiscatory and would violate Article 7 (Common Benefit clause) of Vermont's Constitution; *Baker v. State*, 170 Vt. 194, 203 (1999); *State v. Ludlow Supermarkets, Inc.,* 141 Vt. 261 (1982); *Petitions of New England Tel. & Tel., Co*., 80 A.2d 671, 694-5 (Vt. 1951)(commission correctly "ruled that it was beyond its authority under [Vermont] statutes to require the refund requested by the State. . .[and] it had no power to cure discrimination in rates by an order which would result in the company operating under unreasonably low and confiscatory rates during the period when the assumed unjustly discriminatory rates were in effect." (citations omitted).. .[Commission] must make a further decision based on evidence that such reduced rate would be fair and reasonable and not confiscatory….") While the GMCB might be advancing a noble goal (lowering cost of health plan rates for VISG members), the means selected by the GMCB (reducing factors that have been demonstrated to be actuarially sound causing the rates to be inadequate) is unjust to BCBSVT's non-VISG members as surplus is depleted to fund the inadequacy and will ultimately harm all BCBSVT members if BCBSVT becomes financially troubled or, worse, insolvent;

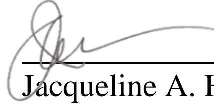
4. The Board's failure to reopen the 2018 QHP rate filing when federal CSR payments were defunded caused BCBSVT 's entire book of business to, in effect, subsidize 2018 QHP rates by $7 million through surplus depletion. BCBSVT has not proposed recoupment of that loss in the 2019 VISG rates.

5. BCBSVT's provider contracting efforts have led to lowest possible provider costs and the results are reflected in overall lower trends in the VISG filing.

6. BCBSVT has already introduced into its filed and amended rates mitigation strategies totaling 4.2 percent of premiums, or approximately $16 million. The results of those efforts are

reflected in overall lower expected claims costs. Further rate reductions would not be based on evidence in the record, would undermine affordability and access to quality care by threatening BCBSVT's solvency, and would be arbitrary and capricious.

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



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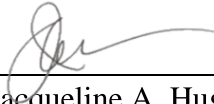
CERTIFICATE OF SERVICE

I hereby certify that the above *BCBSVT Memorandum of Law* has been duly served upon Judith Henkin, General Counsel to the Green Mountain Care Board, and Kaili Kuiper, Eric Schultheis and Jay Angoff, representing the Office of Vermont Health Advocate, by electronic mail, return receipt requested, this 3rd day of August, 2018.



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