

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
)

**REPLY MEMORANDUM OF LAW AND
SUPPLEMENTAL PROPOSED FINDINGS OF FACT**

Blue Cross and Blue Shield of Vermont (BCBSVT) files this reply to the post-hearing memorandum of the Vermont Health Care Advocate (HCA) to correct the record for many misstatements of fact. BCBSVT’s request for approval of the rates as amended has been fully supported through the evidence and through BCBSVT testimony and that of DFR and L&E, as documented through its post-hearing memorandum, proposed findings of fact and conclusions of law. In this reply, BCBSVT points out the clear evidence that contradicts each of the HCA’s assertions (for readability, we use the headings used by the HCA).

A. Not excessive, inadequate, or unfairly discriminatory. All witnesses agreed that these are actuarial measures. Binder (B.) 291-310; Addendum (Adm.) 3; Tr. 62-63; 139; 274-276; 289-90; 294-296. All actuaries agreed that the proposed rates are not excessive, inadequate, or unfairly discriminatory. Id.

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. This assertion is directly refuted in testimony in many ways. The tax benefits are not guaranteed. B. 315. Tr. 238, 242-243. DFR ordered BCBSVT not to recognize the future AMT refund in its current financial statement because “otherwise it would be misleading and overstated.” Tr. 238. L&E testified that it would be in conflict with actuarial standards of practice to include a line item to target a specific Risk-Based Capital (RBC) level. Tr. 286. BCBSVT considered the AMT credits in choosing to file a Contribution to Policyholder Reserves

(CTR) of 1.5 percent. B. 181-2, 257-8; Tr. 107, 243. The AMT credits anticipated to be received in late 2019 or early 2020 will not cause RBC to exceed the top end of the RBC range mandated by DFR. Tr. 195. BCBSVT will, appropriately, apply the credit for the full benefit of subscribers if and when it is received, either through direct rate mitigation and/or rebuilding of depleted reserves. B. 180-3; Tr. 80-82, 244.

The substance of the HCA's argument is that the Board should deplete BCBSVT's policyholder reserves in anticipation of receipt of a future tax refund. This approach is confiscatory and violates the Common Benefits Clause and is therefore not permitted under the U.S. or Vermont Constitutions. See BCBSVT Memorandum of Law, Finding of Fact, pp. 3, and Conclusions of Law, p. 11.

2. BCBSVT's proposed rate is excessive because it double-counts for the deterioration of the risk pool's health status. This argument is directly refuted by BCBSVT testimony. Tr. 118-119. The HCA argument also impugns the work of L&E, who stated in testimony and the Addendum to its opinion that the BCBSVT amended rate, which incorporates the L&E recommendations, "does not produce rates that are excessive." Tr. 289; Adm. 3.
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. This argument is in direct conflict with L&E expert testimony that the assumptions are reasonable, and that the 2020 Vermont mandate is expected to have no impact on 2019 behavior. B. 300; Tr. 283-284. The HCA argument also conflicts with L&E's independent analysis conducted for GMCB and DFR which reached the same conclusion as BCBSVT. Id.

B. Affordability. BCBSVT offers a tremendous amount of evidence that the rates as amended are as affordable as possible given the statutory and regulatory framework, without compromising quality or access to care. B. 235-253; Tr. 63, 69, 76-7, 97, 124, 126.

1. A measure of BCBSVT rate affordability. The HCA presents a definition of affordability and argues that if rates fail to meet its definition, carriers must subsidize those rates out of policyholder reserves. The GMCB has not defined affordability. Tr. 141. The Legislature has not defined affordability. Id. GMCB orders must abide by the U.S. Constitution, 5th Amendment and the Vermont Constitution, Ch.1, Articles 2, 7 and 9. Requiring a carrier to subsidize rates from its policyholder reserves is confiscatory and unconstitutional. Id.
 2. “Silver stacking” and affordability for subsidized Vermonters. A simple analysis of L&E opinions on the 2019 VISG filings will readily show that the rates recommended by L&E in both dockets would result in subsidized BCBSVT members paying significantly *lower* premiums for their coverage, as the second-lowest on-exchange silver plan would increase at a much higher rate than any BCBSVT plan.
- C. Access to Care. See B. 227, 235-256, 258-260, 265-6, 268-70, 272, 277-9, 281-2; Tr. 63, 69, 76-7, 86, 90, 97, 125-6, 129, 141, 151.
- D. Quality Care. See B. 227, 235-256, 258-60, 266-7, 272, 277-9; Tr. 63, 76-7, 97, 124, 126, 141, 151.
- E. Solvency. Remarkably, the HCA substitutes its own assessment of BCBSVT solvency for that of DFR. The Board is required to protect BCBSVT’s solvency. 8 V.S.A. § 4512.

BCBSVT’s solvency regulator has offered extensive evidence that:

BCBSVT’s Risk Based Capital (“RBC”) ratio has been in decline since 2014, is approaching the bottom of the Company’s targeted range, and is at its lowest point since the establishment of the Green Mountain Care Board (“GMCB”). Further, any downward adjustments to the filing’s rate components that are not actuarially supported will likely erode BCBSVT’s surplus and negatively impact its solvency over time. When coupled with the unpredictability surrounding federal health care policy (and its corresponding impact on Vermont’s health insurance market), however, there is an elevated risk of nearer term solvency concerns for BCBSVT. B. 311.

See also B. 282-3, 312-315. Tr. 233-238, 259-260.

F. Not unjust, unfair, inequitable, or misleading.

1. BCBSVT has not reflected [the AMT tax refund] in its filings in any way. See A1 above.
2. BCBSVT's amendment is procedurally improper. The amendment has been admitted into evidence, tr. 34-35, as has L&E's Addendum finding the amendment to be supported, reasonable, and actuarially sound. Day 2 Tr. 5. Extensive examination and cross-examination were conducted on the amendment, Tr. 32-3, 38-40, 55, 58, 126, 142-7, 191-5, 204, 213-4, 218-21, 236, 248-252, 258-9, 261-62, 267, 290, and written questions were posed and responses filed before and after hearing. Adm. Amendments are sometimes necessary given changes that occur after the mandatory filing date, especially when those changes are outside of BCBSVT's control. Tr. 33, 38-40, 142-7, 248-252.
3. Accepting the amendment would set a bad precedent. We will agree that it is bad precedent for the Vermont legislature and the Trump administration to pass laws and change rules affecting the upcoming benefit plan year after the mandatory filing date.¹ However, given the timing of these changes, it was appropriate and reasonable for BCBSVT to file an amendment. Tr. 142-7; 290. BCBSVT informed the Board and the HCA on July 12 of its intention to file an amendment and the subject matters of the amendment. The amendment, exhibit 17, was filed on July 18.²
4. The amendment promotes bad policy by prematurely fragmenting the single risk pool.
The HCA mischaracterizes the amendment as *BCBSVT* causing segmentation of the

¹ A similar late federal change in 2017 defunding CSR payments caused BCBSVT, which was not given the opportunity to amend its filing, to suffer a \$7 million loss.

² BCBSVT is an efficient, streamlined operation: the same staff who prepared the amendment are those who led the preparation of seven rounds of questions (a total of 59 questions, plus subparts, and 73 pages of responses and support) between June 15 and July 10, the time period during which new federal AHP rules were released. Rather than filing three to four separate amendments, none of which could have incorporated the L&E recommendations prior to July 10, BCBSVT determined that it would be far simpler for the parties to be able to review a single amendment encompassing all issues.

market.³ Tr. 248-252. Rather, it is the new federal policy that is segmenting the market. Id. The marketplace has dictated interest in these plans. Id. DFR would have concerns if BCBSVT were unable or unwilling to respond to the shift in the marketplace. Id. The amendment was supported, reasonable, and actuarially sound. Adm. The Vermont market's good faith implementation of a federal policy change—even if some Vermont entities believe it to be bad policy—does not justify intentionally underfunding actuarially sound rates. Tr. 248-252, 291.

BCBSVT reiterates its request that the Board approve the rates as amended.

Dated at Berlin, Vermont, this 8th day of August, 2018.

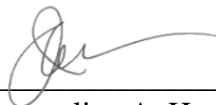


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³ The HCA references to testimony in a different docket are improper and should be ignored. BCBSVT was not a party to Docket 8-18-rr.

CERTIFICATE OF SERVICE

I hereby certify that the above *Reply 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 8th day of August, 2018.



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