STATE OF VERMONT
GREEN MOUNTAIN CARE BOARD

In re: MVP Health Plan, Inc. 2025 Individual Market Rate Filing	)))	GMCB-005-24rr SERFF No. MVPH-134081032

In re: MVP Health Plan, Inc. 2025 Small Group Market Rate Filing	)))	GMCB-006-24rr SERFF No. MVPH-134081005

HCA'S OPPOSITION TO MVP'S MOTION TO ADMIT EXHBITS 28–31

The Office of the Health Care Advocate (HCA) offers the following opposition to MVP Health Plan, Inc.'s (MVP) motion to admit into evidence in the above-referenced dockets four documents marked Exhibits 28, 29, 30, and 31. We disagree with the argument that Exhibit 31 can be admitted through administrative notice. As to the remaining arguments, although we agree that the exhibits should be evaluated under the Vermont Administrative Procedures Act (APA), and specifically 3 V.S.A. § 810(1) and related case law, we disagree about the conclusions to be reached under such an analysis.

I. Introduction

On a high level, each of the documents is undeniably hearsay—a fact which MVP does not contest. MVP Mot. to Admit at 5-6. As such, these exhibits would be inadmissible in a civil proceeding. MVP has not asserted that a hearsay exception applies, and neither has the HCA identified one. The question then turns to whether these proposed exhibits meet the relaxed admissibility standard established by the APA, e.g. first, whether the documents are "irrelevant, immaterial, and unduly repetitious" in which case they should be excluded; and, if not, whether the documents are of the "type commonly relied upon by reasonably prudent persons in the ordinary conduct of their affairs." 3 V.S.A. § 810(1). After reviewing each of the documents, we

assert they should be excluded in the first instance as irrelevant and immaterial, and, in the second instance, where relevant material does appear, as being not of the "type commonly relied upon by reasonably prudent persons in the ordinary conduct of their affairs"—in this case, reasonably prudent Vermont regulators in their ordinary conduct overseeing the state's health care system.

The cases cited by MVP are easily distinguishable. Although MVP pulls the most favorable quote in all the relevant Vermont case law, MVP Mot. at 4, it bears mentioning that Lambert v. Department of Taxes, No. 2019-248, 2020 WL 95933 (Vt. Jan. 6, 2020), is a non-precedential case, more importantly, that it involved admission of a taxpayer's W2s into evidence in an administrative tax case in which the taxpayer's earnings were at issue. Lambert, 2020 WL 95933 at *1. Clearly, a taxpayer's W2 meets the APA's "reasonably relied upon" standard in a way that MVP's proposed exhibits do not, as will be discussed below. Although Lambert is non-precedential, it pulls the favorable quote from Petition of Central Vermont Service Corp. for a 6.23% Increase in Rates, 141 Vt. 284 (Vt. 1982), which itself is readily distinguishable. In Central Vermont Service Corp, the administrative agency excluded updated evidence about a utility's actual power usage, clearly evidence "reasonably relied upon" which the Vermont Supreme Court ultimately reversed over. Cent. Vt. Serv. Corp., 141 Vt. at 290, 94. The equivalent in these proceedings would be the Board excluding updated claims data from MVP. As will be discussed below, MVP's proposed exhibits are not at all like the updated utility data at issue in Central Vermont Service Corp. Finally, MVP relies on another non-precedential case, In re Fuad Ndibalema SNF Freshstart, LLC, 2016 WL 5921035 (Vt. Oct. 7, 2016), for the proposition that the Vermont Supreme Court has affirmed agency decisions that have relied on hearsay. MVP Mot at 5-6. Except the hearsay at issue in Freshstart—a witness's statement that

the respondent-licensee had not been seen using a particular kitchen in some time, which was used to prove that the licensee had been cooking samosas in an unlicensed kitchen and thus grounds for suspension of the licensee's food service license—cannot be compared to the hearsay at issue this case, comprising roughly 300 pages and a multitude of declarants, which MVP intends to use as evidence that its rates are affordable, promote access to care, and promote quality care. Quite simply, the cases and the hearsay at issue could not be any more different.

MVP asserts that the proposed exhibits are in response to the Board's request for more evidence about affordability and the other non-actuarial criteria. MVP Mot. at 3. We recognize that the Board has called upon all carriers submitting rates in Vermont to do a better job addressing all of the rate review criteria in their filings. We find it hard to believe, though, that the documents MVP is offering here are of the type the Board would "reasonably rely upon"—without any opportunity for cross-examination—and consider as evidence from which to draw findings and legal conclusions about matters as weighty as whether MVP's rates are affordable and promote access and quality care.

We detail our objections to each of the proposed exhibits below.

II. Exhibit 28: Craig Garthwaite, <u>The Economics of Medicare for All</u> (Nov. 2019)

On the website where the document is posted, the author describes this exhibit as a "memo [that] provides a framework for evaluating the economic trade-offs of expanding [a] system such as Medicare for All." The memo consists of five parts, all but the last of which focuses on the economics of single-payer health care systems. As such, at least four-fifths of the paper is irrelevant to any fact at issue in these proceedings and could be properly excluded under § 810 on those grounds.

Even if the final part of the paper entitled "Market-Based Policies to Improve U.S. Health Care" contains relevant material, it is not of the type that is commonly relied upon by reasonably prudent persons—in this case reasonably prudent health care regulators—in the conduct of their affairs. The paper was not published in an academic journal nor is it peer reviewed. It was published by the Aspen Institute Economic Strategy Group as part of a larger publication entitled Maintaining the Strength of American Capitalism. According to Google Scholar, despite being released in 2019, nearly five years ago, it has not been cited a single time. No government entity adopted the paper, no funding for the work was disclosed, and it does not even appear to be endorsed by the Northwestern University Kellog School of Business, Mr. Garthwaite's employer. In summary, even if a small portion of the document is marginally relevant, the memo is a personal opinion piece funded by unknown sources, and thus is not the type of evidence that would be reasonably relied upon by state health care regulators.

III. Exhibit 29: Craig Garthwaite, et al, Endogenous Quality Investments in the U.S. Hospital Market (Nov. 2021)

The article lacks relevance to these rate review proceedings and should be excluded. One of the authors' core assumptions may not even apply in Vermont and other highly regulated states. The authors assume that "in the privately insured segment, hospitals bargain with profit-maximizing insurers" whereas in the publicly insured segment, the government sets the prices. Ex. 29 at 10. This is a faulty assumption in Vermont and other states that regulate the privately insured segment. In regulated states, rates are at least partially set by government actors (in Vermont, via the hospital budget process). Since this assumption is core to the authors' model, the modelling results are not relevant to Vermont's hospital and insurance markets and therefore not relevant to these rate review proceedings.

The article is also not of the type that would be "reasonably relied upon" by reasonably prudent health care regulators for determining whether a health insurer's rates promote quality care. Published by the National Bureau of Economic Research in 2021, and subsequently published by the Journal of Health Economics in 2022, the article has only been cited 32 times according to Google Scholar. Measured against Craig Garthwaite's influence in the health economics space, it does not appear the article had a large impact. In comparison, his most cited article, Giving Mom a Break: The Impact of Higher EITC Payments on Maternal Health, has been cited 482 times. Additionally, the authors employ a complicated fixed-effect model underpinned by complex indices and demographic data from 2010. It is also unclear if any Vermont hospitals were included in the data. In sum, the article is not of the type that Vermont health care regulators would reasonably rely upon without any opportunity to cross-examine the authors about their methods and conclusions.

IV. Exhibit 30: Amici Curiae Brief of 38 Health Policy Experts in Support of Plaintiffs-Appellees, Doe #1, et al., v. Trump, No. 19-36020 (9th Cir, Feb. 2020)

The document is not relevant to the proceedings and should be excluded from evidence. The brief is about a never enforced, Trump-era Presidential Proclamation that would have barred immigration to the United States to people who could not prove they had the means to purchase unsubsidized health insurance or pay out of pocket for their own care. The proclamation at issue purported to address uncompensated care, not affordability of health insurance. The amici authors devoted many pages of the brief to arguing how the proclamation would actually lead to more uncompensated care by driving people to less comprehensive forms of insurance such as short-term insurance and visitor's insurance. Immigration policy under a former president, uncompensated care, and the drawbacks of non-comprehensive health insurance are simply not

at issue in these proceedings. For these reasons, the document is irrelevant and should not be admitted into evidence.

If MVP wishes to make the point that the Affordable Care Act facilitates affordable access to comprehensive health insurance through subsidies in the individual market, it can do so without the admission of irrelevant hearsay. In fact, it has already done so through the pre-filed testimony of its actuary, Eric Bachner. If there are additional aspects of the ACA's subsidies not addressed in Mr. Bachner's prefiled testimony, it would be more appropriate simply to take administrative notice of those facts. Quite simply, the mechanisms by which the ACA reduces the cost burden of purchasing and using health insurance are not disputed. We would, however, take issue with MVP cherry picking quotes from this exhibit, such as "Congress has ensured that all recently arrived immigrants have access to affordable, non-discriminatory, comprehensive coverage", Ex. 30 at 25, and offering such a statement as evidence that its rates are affordable, since Congress has ensured it is so. The issue of what constitutes affordable health insurance rates under Vermont law is far more complicated and cannot be reduced to the well-meaning arguments of 38 health policy experts arguing against a misguided Presidential Proclamation. As such, the document is also not something that would be reasonably relied upon by Vermont regulators as evidence that an insurer's health insurance rates are affordable.

V. Exhibit 31: Making Health Care More Affordable: Lowering Drug Prices and Increasing Transparency, Testimony to the U.S. House of Representatives Committee on Education and Labor (Sept. 26, 2019)

This 180-page document comprises the record of a U.S. House committee's hearing on the Lowering Drug Cost Now Act—a bill that never became law (though parts of it did years later, adding to the confusion)—and consists of the transcript of the hearing that took place nearly five years ago, with all the usual partisan posturing that has become typical of congressional committee hearings, and also includes the prepared written testimony submitted by

the hearing witnesses. By rough estimation, at least half of the 180 pages are devoted to the debate over whether Medicare should be allowed to negotiate prescription drug prices with drug manufacturers. In short, this exhibit is not relevant to these rate review proceedings and should be excluded from evidence.

Admittedly, there are some pages in this document that touch upon relevant topics. One can readily pick out sentences that MVP would likely quote—after all, one of the witnesses is Craig Garthwaite. There are also sentences the HCA could quote. Regardless, the prepared statements and written testimony of witnesses to a congressional hearing, witnesses who were no doubt selected for their ability to contribute to members' political and policy viewpoints, such statements are not of the type that would be reasonably relied upon by Vermont health care regulators in deciding matters as weighty as whether MVP's rates are affordable and promote access and quality. As such, the Board should decline to admit this exhibit into evidence.

MVP argues that this exhibit be admitted through administrative notice, but this argument is unavailing. Administrative notice can be taken of specific facts, which must be facts that are not subject to reasonable dispute in that they are generally known or readily determined by sources whose accuracy cannot be questioned. V.R.E. 201. While it might appropriate to take administrative notice that a legislative hearing took place on a particular day, the facts asserted by the witnesses at the hearing are not appropriate for administrative notice. MVP's argument on this point should fail, and the document should not be admitted.

VI. Conclusion

As discussed herein, MVP's proposed exhibits 28 through 31 are in large part irrelevant to these rate review proceedings, and where relevance can plausibly be argued, the material is not of the type that would be reasonably relied upon by prudent state health care regulators in

drawing facts and legal conclusions about matters at stake in these proceedings. The exhibits should not be admitted into evidence.

We can appreciate MVP's frustration at being told to do a better job of presenting evidence about the non-actuarial factors at issue, without clear guidance on what that evidence should be. But we find it hard to believe that MVP sincerely believes these exhibits are the type of evidence the Board is seeking and would find helpful. We also find it hard to believe that MVP would not also be objecting mightily if the shoe were on the other foot, that is, if the HCA were attempting to admit 300 pages of hearsay with no notice one week before the hearing. They certainly would. And that points to what seems like an obvious danger here, should the Board decide to admit these exhibits. The HCA can drum up 300 pages of reports written by esteemed experts that tangentially relate to the rate review criteria, too. But is that really what any of us want these proceedings to devolve into? We hope not.

Respectfully we ask the Board to deny MVP's motion to admit exhibits 28, 29, 30, and 31 as evidence in these proceedings.

Dated in Rutland, Vermont, this 19th day of July 2024.

/s/ Charles Becker
Charles Becker, Esq.
Office of the Health Care Advocate
Vermont Legal Aid
1085 U.S. Route 4, Suite 1A
Rutland, VT 05701
Voice (802) 775-0021 ext. 435
HCAratereview@vtlegalaid.org

/s/ Eric Schultheis
Eric Schultheis, Ph.D., Esq.
Office of the Health Care Advocate
Vermont Legal Aid
56 College Street
Montpelier, VT 05602
Voice (802) 223-6377 ext. 325
HCAratereview@vtlegalaid.org

CERTIFICATE OF SERVICE

I, Charles Becker, hereby certify that I have served the above HCA's Opposition to MVP's Motion to Admit Exhibits 28–31 on Michael Barber and Laura Beliveau of the Green Mountain Care Board and Gary Karnedy, Ryan Long, and Hannah Lebel, Primmer Piper Eggleston & Cramer PC, representatives of MVP Health Care in the above-captioned matters, by electronic mail, delivery receipt requested, this 19th day of July 2024.

/s/ Charles Becker
Charles Becker
Staff Attorney
Office of the Health Care Advocate
Vermont Legal Aid
1085 U.S. Route 4, Suite 1A
Rutland, VT 05701