

STATE OF VERMONT  
GREEN MOUNTAIN CARE BOARD

In re: MVP Health Plan, Inc.	)	
2025 Small Group and Individual Group	)	DOCKET NOS. GMCB-005-24rr
Vermont Health Connect Rate Filing	)	GMCB-006-24rr
	)	
SERFF Nos. MVPH-134081005	)	
MVPH-134081032	)	

**MVP’S MOTION TO ADMIT EXHIBITS 28–31 INTO EVIDENCE**

MVP Health Plan, Inc., (“MVP”) by and through Primmer Piper Eggleston & Cramer PC, moves for the admission of Exhibits 28-31<sup>1</sup> (as defined below) into evidence for the July 24, 2024 Vermont Health Connect 2025 Rate Filing Hearing as discussed at the July 17, 2024 pre-hearing conference. Simply put, the more information the Board has in this expedited administrative proceeding, the better its decision-making. Ultimately, the Board can then give this relevant evidence whatever weight it deems appropriate.

**PRELIMINARY STATEMENT**

MVP and the Office of the Health Care Advocate (“HCA”) disagree over the admissibility of four MVP exhibits, all of which relate to affordability and other non-actuarial statutory criteria. MVP now moves for admission of those exhibits. These exhibits include: (i) *The Economics of Medicare for All*, a memo by economist Craig Garthwaite (“Exhibit 28”); *Endogenous Quality Investments in the U.S. Hospital Market*, a journal article by Craig Garthwaite, Christopher Ody, and Amanda Starc (“Exhibit 29”); Brief of 38 Health Policy Experts as Amici Curae, *John Doe #1, et al. v. Donald Trump*, Case No 3:19-cv-01743-SB (2020) (“Exhibit 30”); and *Making Health Care More Affordable: Lowering Drug Prices and Increasing Transparency*, Hearing Before the

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<sup>1</sup> References herein are to the Exhibits as enumerated in the hard-copy and electronic hearing exhibit binders.

Subcomm. on Health, Emp., Lab. and Pensions, 116<sup>th</sup> Cong. 1 (2019) (“Exhibit 31”) (collectively, the “Exhibits”).

The Exhibits are related to health care and economic public policy which MVP would reference only in its briefing and opening and closing arguments. No MVP witness will be testifying about the Exhibits.

The Board should grant this Motion and admit all four exhibits for the following reasons:

First, the Board has routinely requested additional evidence on affordability and other non-actuarial statutory criteria. The information contained in the Exhibits is evidence on these very criteria, which is a matter which the Board has clearly deemed relevant.

Second, unlike a Court proceeding, the Board has discretion in this administrative setting, under the Administrative Procedure Act, 3 V.S.A. § 810 (“APA”), to consider any relevant and reliable evidence.

Third, as an administrative agency charged with guiding health care public policy for Vermont, the Board considers reliable hearsay information all the time regarding health care and economic policy. It has cited to such information in its Orders. *See, e.g., In re: MVP Health Plan, Inc. 2024 Vermont Health Connect Rate Filing, GMCB-004-23rr and GMCB-005-23rr, Decision and Order ¶¶ 22, 37; In re: MVP Health Plan, Inc. 2023 Vermont Health Connect Rate Filing, GMCB-007-21rr and GMCB-008-21rr ¶ 49.* MVP and the HCA have also proffered information from third party data sources, which has been relevant and reliable and has been admitted into evidence by the Board in past administrative proceedings. The Board has found all of this hearsay evidence relevant, reliable and helpful for many years.

Fourth, the Board may take administrative notice of legislative materials.

## ARGUMENT

### **I. The Exhibits Provide Relevant Information That The Board Has Requested In Prior Years.**

In prior years the Board has asked MVP to provide additional evidence on affordability and non-actuarial criteria. *In re: MVP Health Plan, Inc. 2024 Vermont Health Connect Rate Filing, GMCB-004-23rr and GMCB-005-23rr, Decision and Order* at p. 20; *In re: MVP Health Plan, Inc. 2023 Vermont Health Connect Rate Filing, GMCB-005-22rr and GMCB-006-22rr* at p. 21. The HCA has also argued that MVP failed to offer evidence on affordability. *See In re: MVP Health Plan, Inc. 2024 Vermont Health Connect Rate Filing, GMCB-004-23rr and GMCB-005-23rr, Office of the Health Care Advocate Post-Hearing Memorandum*, p 4. Last year, the Board went further. Although MVP's rates were ultimately approved with slight modifications, the Board's decision and order noted that "MVP failed to satisfy its burden of justifying the requested rates because there is insufficient evidence demonstrating the rates are affordable and promote access and quality." *In re: MVP Health Plan, Inc. 2024 Vermont Health Connect Rate Filing, GMCB-004-23rr and GMCB-005-23rr, Decision and Order* at p. 20.

By offering the Exhibits into evidence, MVP is responding to the Board's request for more evidence about affordability and non-actuarial criteria. This expedited, informal, one-day administrative hearing contemplates the submission of pre-filed testimony and other evidence for the Board to review as it deliberates before its decision is issued on August 12, 2024. Exclusion of this requested evidence is contrary to that purpose.

Therefore, the Exhibits should be admitted into evidence pursuant to the Board's own request and their discretion afforded under 3 V.S.A. § 810 (*infra*).

**II. The Exhibits Are Relevant And Reliable Evidence And Should Be Admitted Based On The Board's Broad Discretion Under 3 V.S.A. § 810.**

The Board has broad discretion to admit relevant reliable evidence. Pursuant to Green Mountain Care Board Rule 2.307(d)(3), admissibility determinations are governed not just by the Vermont Rules of Evidence, but by the APA. Under the APA, the Board has the discretion to admit in this administrative proceedings “any evidence which may illuminate the case.” *Lambert v. Dep’t of Taxes*, No. 2019-248, 2020 WL 95933, at \*2 (Vt. Jan. 6, 2020) (administrative agency’s discretion to admit evidence that “‘would normally be excluded in court hearings’ is codified in 3 V.S.A. § 810(1) . . .”) (quoting *Petition of Cent. Vermont Pub. Serv. Corp. for a 6.23% Increase in Rates*, 141 Vt. 284, 292 (1982)) (reversing and remanding that rate review decision based on agency’s exclusion of relevant pre-filed evidence where “[t]he exclusion of relevant evidence in an administrative proceeding is presumptively invalid” when admissibility is governed by the APA)). Furthermore, while the APA broadens the scope of admissibility, “the right to admit such evidence does not imply that agencies are also free to exclude relevant evidence.” *Id.* (citing *In re New England Power Corp.*, 103 Vt. 453, 459 (1931) (“An agency refusal to receive evidence that is competent, relevant, and material is reversible error.”)).

The Exhibits are reliable and relevant evidence that will help the Board as it considers important public policy views about affordability and other non-actuarial statutory criteria. These Exhibits speak to general public policy issues, and are not subjects warranting a second day of hearings on economics or extensive cross-examination.

The author of Exhibits 28 and 29 is Professor Craig Garthwaite, a highly regarded Professor of Strategy and the Director of the Program on Healthcare at Northwestern University’s Kellogg School of Management who holds a PhD in Economics and a Masters in Public Policy. Garthwaite’s publications speak directly to the pricing of medical care and associated costs, and

the implications and effects of relevant public policy concerns. Exhibit 30 is an amicus brief, submitted by a group of 38 distinguished professors and researchers from the disciplines of economics, public health, health policy, and law. These individuals are experts on the economic and social forces operating in the health care and health insurance markets. These professionals' familiarity with and knowledge of the complexities of the health care system can assist the Board with understanding affordability and the other non-actuarial statutory criteria and may help illuminate the case. Finally, Exhibit 31 is a hearing transcript from a hearing before the Subcommittee on Health, Employment, Labor and Pensions where six witnesses, including Professor Craig Garthwaite, provided testimony on making health care more affordable, lowering drug prices, and increasing transparency in connection with the proposed Lowering Drug Cost Now Act. This is a particularly reliable piece of evidence given that it is a legislative material.

Each of these exhibits should be admitted pursuant to the Board's broad discretion under the APA to allow in evidence that is particularly reliable and relevant and which may help illuminate the case.

### **III. The Board Has Previously Admitted Hearsay Without Issue.**

The HCA will likely argue that the Exhibits constitute hearsay and as such should be barred from admission into evidence. However, the Board has previously admitted hearsay. For example, just last year the HCA objected to certain portions of MVP's pre-filed testimony on the basis that it constituted inadmissible hearsay. The Board allowed all of the evidence in, and determined that "very similar evidence ha[d] been admitted in prior proceedings without objection . . . ." *MVP July 17, 2023, Vermont Health Connect Rate Review Hearing Transcript at 13:19-25.*

Additionally, the Vermont Supreme Court has affirmed agency decisions in the past which relied on hearsay evidence. *In re Fuad Ndibalema SNF Freshstart, LLC*, No. 2016-049, 2016 WL

5921035, at \*2 (Vt. Oct. 7, 2016) (affirming on APA grounds, the Vermont Board of Health's suspension of license over licensee's challenge to board's reliance on hearsay evidence).

In *MVP July 20, 2022, Vermont Health Connect Rate Review Hearing Transcript* at 13:12-19, the Board admitted the HCA's exhibit (2021 Vermont Household Survey) over MVP's hearsay objection, noting such relevant and reliable evidence should be admitted. *MVP July 20, 2022, Vermont Health Connect Rate Review Hearing Transcript* at 220:4-221:5.

Additionally, 3 V.S.A. § 810 allows admission of evidence that may otherwise be excluded under Vermont Rules of Evidence where "it is of a type commonly relied upon by reasonably prudent [persons] in the conduct of their affairs." *MVP July 20, 2022, Vermont Health Connect Rate Review Hearing Transcript* at 220:4-221:5. Reasonably prudent persons often rely on materials authored by informed professionals to inform decisions they are making about fields in which they themselves may not be so informed. By admitting these Exhibits into evidence, the Board will be able to review and consider relevant information provided by economists who are experts in the health care space. Therefore, these Exhibits can and should be admitted over any hearsay objections.

**IV. Administrative Notice Can Be Taken of Exhibit 31 Because It Is A Legislative Material.**

Judicial notice (and "administrative notice," its corollary here) allows a court, or in this case, the Board, to admit evidence without formal presentation or other evidentiary restrictions. Vt. R. Evid. 201. Exhibit 31 is a transcript of testimony given at a hearing before the Subcommittee on Health, Employment, Labor and Pensions during which the committee members and six witnesses were discussing the proposed Lowering Drug Cost Now Act (H.R. 3). The bill passed in the House but was not taken up for a vote in the Senate. The witnesses who testified at the

hearing were brought in to shed light on the implications of the bill if it were to become law, making their testimony akin to legislative facts.

Legislative facts are facts that are general, relate to the content of law and policy, and do not concern only the parties involved in the case at hand. *State v. Gates*, No. 2003-268, 2005 WL 6154109, at \*2 (Vt. 2005) (citing *Rodriguez v. State*, 90 S.W.3d 340, 360 (Tex.App.2001)). Courts may take judicial notice of legislative facts as the Board may take administrative notice of legislative facts—in its “absolute discretion, unrestricted by the rules.” *Id.* As such, the witnesses’ testimony may be considered legislative facts, and are able to be admitted on administrative notice. Therefore, Exhibit 31 is admissible on administrative notice alone.

### **CONCLUSION**

The Board has broad discretion to consider relevant evidence in these expedited administrative proceedings. The Exhibits provide helpful information related to affordability and other non-actuarial statutory criteria the Board has asked for in the past which should be admitted into evidence here. The Board may give this evidence the weight it deems appropriate. Therefore, the Board should grant this Motion.

Dated: July 18, 2024

PRIMMER PIPER EGGLESTON & CRAMER PC

By: /s/ Gary F. Karnedy  
Gary F. Karnedy, Esq.  
Ryan M. Long, Esq.  
30 Main Street, Suite 500  
P.O. Box 1489  
Burlington, VT 05402-1489  
(802) 864-0880  
[gkarnedy@primmer.com](mailto:gkarnedy@primmer.com)  
[rlong@primmer.com](mailto:rlong@primmer.com)

*Attorneys for MVP Health Plan, Inc.*