

IN THE SUPREME COURT OF PENNSYLVANIA

No. 39 MAP 2019

**COMMONWEALTH OF PENNSYLVANIA, by Josh Shapiro,
Attorney General; PENNSYLVANIA DEPARTMENT OF
INSURANCE, by Jessica K. Altman, Insurance Commissioner
and PENNSYLVANIA DEPARTMENT OF HEALTH, by Rachel
Levine, Secretary of Health,**

v.

**UPMC, a nonprofit corp.; UPE, a/k/a HIGHMARK HEALTH, a
nonprofit corp.; and HIGHMARK, INC., a nonprofit corp.,**

Appeal of: Commonwealth by Josh Shapiro, Attorney General

**REPRODUCED RECORD
VOLUME IV**

APPEAL FROM THE ORDER OF THE COMMONWEALTH
COURT ENTERED ON APRIL 3, 2019 AT NO. 334 MD 2014

JOSH SHAPIRO
Attorney General

JONATHAN SCOTT GOLDMAN
*Executive Deputy Attorney General
Civil Law Division*

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MARK A. PACELLA
*Chief, Charitable Trusts
Organizations Section*

DATE: April 30, 2019

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COMMONWEALTH OF PENNSYLVANIA
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June 24, 2014

W. Thomas McGough, Jr.
Senior Vice President & Chief Legal Officer
UPMC
U.S. Steel Tower, Suite 6241
600 Grant Street
Pittsburgh, PA 15219

Thomas L. Vankirk
Executive Vice President & CLO
Highmark
Fifth Avenue Place
120 Fifth Avenue, Suite 3112
Pittsburgh, PA 15222-3099

Dear Tom & Tom:

Yen Lucas and I have worked to try to achieve an agreement satisfactory to us and to each of your respective organizations. We believe the enclosed achieves that goal on behalf of western Pennsylvania consumers that our respective agencies have represented during these negotiations. In addition, in the interests of fairness, we have been preparing two separate documents on parallel tracks and trying to the best of our ability to mirror the documents so that each company is essentially under the same obligation. Attached are copies of each of your respective Term Sheets with the language about releases and compliance of law still being drafted.

The Term Sheets reflects some of the changes that each of you have requested over the past 24-hours. We have made a number of accommodating changes to better reflect the thus far collaborative process to try to resolve outstanding issues and to formulate a pro-consumer transition plan. The OAG, however, reserves the right to pursue still outstanding issues related to the charitable/nonprofit status of your respective institutions as well as consumer protection measures that are not addressed in these documents. While there will be ongoing opportunities and negotiations between the parties to resolve some of the open items as part of Highmark's Transition Plan, high level agreement around core principles must be resolved now. With regard to the attached, however, we would emphasize that this represents the Commonwealth's last, best and final terms around these core principles.

COMMONWEALTH

EXHIBIT 9

875a

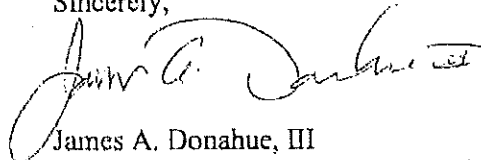
RR 1767a

W. Thomas McGough
Thomas L. Vankirk
June 24, 2014
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Our respective principals have set today as the date by which the parties must reach agreement on the Term Sheets. If we do not have agreement by today, we will commence joint litigation against both parties. Our strong desire, however, is to bring this matter to an amicable resolution and so we encourage you to work with your senior management and boards to gain approval to move forward with the attached.

Thank you for your cooperation.

Sincerely,



James A. Donahue, III
Executive Deputy Attorney General

Enclosures

cc: Attorney General Kane
Michael F. Consedine, Commissioner of Insurance
Michael Wolf, Secretary of Health
Jim Schultz
Yen Lucas

Confidential Settlement Proposal--Not For Public Dissemination.

UPMC Term Sheet for Consent Petition for Final Decree

*Denotes identical or mirrored term in both Highmark and UPMC term sheets. Identical or mirrored terms require same action by both parties.

1. *Form of document – final consent decree filed in Commonwealth Court by the Office of Attorney General (“OAG”), Pennsylvania Insurance Department (“PID”) and Pennsylvania Department of Health (“DOH”) in response to a Petition for Review.
2. *The Consent Decree shall be construed in a manner that is consistent with the PID’s April 29, 2013 Approving Determination and Order of the Highmark/West Penn Allegheny Health System Affiliation (“UPE Order”) and the 2012 Mediated Agreement entered into by the UPMC and Highmark and to protect consumers and the charitable mission of the parties. The outcome of the actions embodied in the consent decree shall be incorporated in the Transition Plan to be filed by Highmark by July 31, 2014 as provided under Condition 22 of the UPE Order. The Consent Decree is not a contract extension and shall be characterized as such.
3. *Dispute Resolution Process – Where required in this term sheet, UPMC and Highmark shall negotiate in good faith. If parties are unable to reach agreement to any of the issues raised in this term sheet by July 15, 2014 or such other date as may be set by OAG, PID and DOH then the terms or rates shall be subject to the following:

a. Rates –

- i. For the period, January 1, 2015 to December 31, 2015, rates for all in-network services covered in this term sheet, except for those rates currently being arbitrated by UPMC and Highmark, shall revert to the last mutually agreed upon rates or fees by UPMC and Highmark with applicable medical market basket index (MBI) increase applied January 1, 2015.
- ii. For rates currently being arbitrated, in the event that the current arbitration between UPMC and Highmark finds in favor of UPMC, then the rates and fees under the Consent Decree will revert to the rates in effect before April 1, 2014 as of the date of the arbitral award and shall remain in place through December 31, 2015. If as a consequence of the arbitral award, Highmark owes UPMC for underpayments, Highmark shall pay UPMC appropriate interest. If as a consequence of the arbitral award, UPMC owes Highmark for overpayments, UPMC shall pay Highmark appropriate interest. If an arbitral award is not decided before January 1, 2015,

Highmark shall increase its payments by one half the difference the Highmark's April 1, 2015 schedule and its rate schedule in effect before April 1, 2014 for the period January 1, 2015 to December 31, 2015.

- iii. For the period beginning January 1, 2016 to the expiration of the Consent Decree or the expiration of any agreements between UPMC and Highmark for all in network services, whichever is later, the rates shall be the rates mutually agreed to by Highmark and UPMC, or UPMC and Highmark shall engage in a single last best offer binding arbitration to resolve any dispute as to rates after December 31, 2015.
- iv. Any agreement or award as to rates and fees will be binding on both UPMC and Highmark, meaning that each will bill and make payments consistent with the agreement or award.

- b. Non-Rate Term – Disputed terms set forth in this term sheet and related to consent decree and unrelated to rate and reimbursement shall be subject to mediation before the OAG, PID and DOH. If mediation does not result in resolution within 30 days or such other time set by the OAG, PID and DOH, UPMC and Highmark shall engage in binding arbitration to resolve the dispute as to terms.

4. Key Transition Issue Agreements

- a. *Continuity of care – UPMC and Highmark mutually agree that the continuation of care of a Highmark member in the midst of a course of treatment at UPMC shall be on an in-network basis at in-network rates. The need for a continuing course of treatment shall be determined, in the first instance, by the patient's treating physician acting in consultation with and in accordance with the wishes of the patient or the patient's representative. While undergoing a continuing course of treatment with UPMC the services covered in-network will include all services reasonably related to that treatment, including but not limited to testing and follow-up care. In the event that Highmark disputes the opinion of the treating physician that a continuation of care is medically appropriate, or disputes the scope of that care, the DOH or its designated representative will review the matter and make a final, non-appealable determination.
- b. *Vulnerable Populations – UPMC and Highmark mutually agree that vulnerable populations include: (i) consumers age 65 or older who are eligible or covered by Medicare, Medicare Advantage, (ii) Medigap health plans, (iii) Medicaid and/or (iv) CHIP. With respect to Highmark covered vulnerable population, UPMC shall continue to contract with Highmark at in-network rates for all of its hospital,

physician and appropriate continuity of care services for CHIP, Highmark Signature 65, Medigap and commercial retiree carve out as long as Highmark does not make unilateral material changes to these programs. UPMC shall treat all Medicare participating consumers as in network regardless of whether they have Medicare as their primary or secondary insurance. UPMC reserves the right to withdraw from these arrangements if Highmark should take the position that it has the authority to revise the rates and fees payable under those arrangements unilaterally and materially.

- c. *Unique/Exception Hospitals/Physicians - UPMC shall negotiate in good faith to reach an agreement with Highmark for hospital, physician services and follow-up care services at Western Psychiatric Institute and Clinic, UPMC Bedford, UPMC Venango (Northwest), UPMC/Hamot and UPMC/Altoona and any facility, any physician services, or any other provider services located or delivered outside the Greater Pittsburgh area currently owned or acquired in the future by UPMC, or with whom UPMC has an agreement to handle provider contracting, such as, but not limited to, the Kane Hospital, or any other physician services or facility outside the Greater Pittsburgh area determined by DOH to be essential to meet local community needs, by July 15, 2014 or be subject to the Dispute Resolution Process. The agreement shall be for a commercially reasonable period of time as provided in Condition 3 of the UPE order. The Greater Pittsburgh area shall mean the Counties of Allegheny, Beaver, Butler, Washington and Westmoreland. The Children's Final Order will continue in effect.
- d. *ER Services -UPMC shall negotiate in good faith to reach an agreement with Highmark on in-network rates and patient transfer protocols for emergency and trauma services for hospital, physician and appropriate continuity of care services at all UPMC and Allegheny Health Network hospitals by July 15, 2014 or be subject to the Dispute Resolution Process. The agreement shall be for a commercially reasonable period of time as provided in Condition 3 of the UPE Order. UPMC shall not balance bill to consumers until the ER services agreement is resolved.
- e. *Local Community Needs - Where UPMC is the provider of services provided locally that the patient's treating physician believes the patient needs and DOH has determined such services are not available from another source, and member is out-of-network, UPMC will not balance bill the member, and UPMC and Highmark shall negotiate a payment that shall not be greater than the out-of-network rates established by this Consent Decree.

- f. *Oncology – Highmark subscribers may access, as if in-network, UPMC services providers, facilities, and physicians involved in the treatment of cancer, if a patient's treating physician determines that a patient who is diagnosed with cancer should be treated by a UPMC oncologist and the patient agrees to be so treated. In addition, UPMC and Highmark shall negotiate an agreement for treatment of illnesses which result from cancer treatment. These resulting illnesses may include, but not be limited to, mental health, endocrinology, orthopedics and cardiology. The need for a treatment of a resulting illness shall be determined, in the first instance, by the patient's treating physician acting in consultation with and in accordance with the wishes of the patient or the patient's representative. Moreover, all UPMC joint ventures, physician services provided at or on behalf of independent hospitals shall be in-network. If UPMC and Highmark do not reach an agreement on rates for cancer treatment and resulting illnesses by July 15, 2014, the parties will be subject to the Dispute Resolution Process. UPMC shall not balance bill consumers until this agreement is resolved. The agreement shall be for a commercially reasonable period of time as provided in Condition 3 of the UPE Order.
- g. *Referrals and UPMC Transfer of Patients – (a) UPMC shall not require its physicians to refer patients to a UPMC Hospital in situations where the patient is covered by a health plan that does not participate with such UPMC Hospital or otherwise expresses a preference to be referred to a non-UPMC Hospital. (b) UPMC shall not refuse to transfer a patient, whether for diagnosis or treatment, to a non-UPMC Hospital or Health-Care Provider if such transfer is requested by the patient, the patient's representative when such representative is authorized to make care decisions for the patient, or the patient's physician; provided the patient is stable and that the transfer is medically appropriate and legally permissible. (c) When a patient in need of transfer is covered by a health plan with which the UPMC Hospital does not contract, UPMC shall transfer the patient to the health-plan's participating non-UPMC facility (provided the patient is stable and that the transfer is medically appropriate and legally permissible) unless (i) the patient or the patient's representative expresses a contrary preference after having been informed of the financial consequences of such a decision or (ii) otherwise approved by the patient's health plan.
- h. * Out-of-Network Services – For all other Highmark subscribers whose care is not otherwise governed by other provisions in this term sheet, beginning January 1, 2015, UPMC will provide services to all such subscribers on an out-of-network basis. UPMC's reimbursement rates for "out-of-network" services for Highmark

subscribers shall be no more than 60% of charges if paid promptly and provided that UPMC informs consumers of such charge before rendering services.

- i. *Safety Net – UPMC and Highmark mutually agree to establish a one year safety net beginning January 1, 2015, for any existing UPMC patient and Highmark subscriber (i) who used UPMC physicians and services in network during the 2014 calendar year, (ii) who is not in continuing course of treatment, and (iii) who is unable to find alternative physicians and services in their locality during the one year period. UPMC and Highmark shall hold such consumers harmless if they continue to use such physicians and services prior to January 1, 2016. Rates for the safety net period shall as set forth under the Dispute Resolution Process. The safety net is not a contract extension and neither Highmark nor UPMC or its agents shall characterize it as such.
5. *Enforcement of the Consent Decree—The OAG, PID and DOH shall have exclusive jurisdiction to enforce the Consent Decree.
- a. If the OAG, PID or DOH believe that a violation of the Consent Decree has taken place, they shall so advise UPMC and give UPMC 20 days to cure the violation. If after that time the violation is not cured, the OAG, PID or DOH may seek enforcement of the Consent Decree in the Commonwealth Court.
 - b. Any person who believes they have been aggrieved by a violation of this Consent Decree may file a complaint with the OAG, PID or DOH for review. If after that review, the OAG, PID or DOH believes either a violation of the Consent Decree has occurred or they need additional information to evaluate the complaint, the complaint shall be forwarded to UPMC for a response within 30 days. If after receiving the response, the OAG, PID or DOH, believe a violation of the Consent Decree has occurred, they shall so advise UPMC and give UPMC 20 days to cure the violation. If after that time the violation is not cured, the OAG, PID or DOH may seek enforcement of the Consent Decree in the Commonwealth Court. If the complaint involves a patient in an ongoing course of treatment who must have the complaint resolved in a shorter period, the OAG, PID or DOH may require responses within periods consistent with appropriate patient care.
6. *Consumer Education Fund and Costs – Highmark and UPMC shall each contribute \$2 million for use by the OAG, PID or DOH for outreach and education purposes during the transition; and to cover costs, including attorneys or consultant fees of the OAG, PID and DOH.

7. *Transfer of Services – If any Services covered by this term sheet are transferred or consolidated at one or more UPMC Hospitals, the terms of this Consent Decree shall apply to those transferred Services where such Services are transferred or consolidated.
8. *Advertising – UPMC shall not engage in any public advertising that is unclear, or misleading in fact or by implication to consumers.
9. *The term of the Final Decree shall be for 5 years from the date of entry.
10. *Release – Language to be negotiated.
11. Compliance with Laws - Language to be negotiated.

UPMC

By: _____

COMMONWEALTH OF PENNSYLVANIA

By: _____

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3. *Dispute Resolution Process – UPMC and Highmark shall negotiate in good faith. If parties are unable to reach agreement to any of the issues raised in this term sheet by July 15, 2014, then the terms or rates shall be subject to the following:
 - a. Rates –
 - i. For the period, January 1, 2015 to December 31, 2015, rates for all in-network services covered in this term sheet, except for those rates currently being arbitrated by UPMC and Highmark, shall revert to the last mutually agreed upon rates or fees by UPMC and Highmark with applicable MBI increase applied January 1, 2015.
 - ii. For rates currently being arbitrated, in the event that the current arbitration between UPMC and Highmark determines that the April 2014 fee schedule was improperly imposed by Highmark, the rates and fees under the Consent Decree will revert to the rates in effect before April 1, 2014 as of the date of the arbitral award and shall remain in place through December 31, 2015. If as a consequence of the arbitral award, Highmark owes UPMC for underpayments, Highmark shall pay UPMC appropriate interest. UPMC and Highmark will use their best efforts to conclude their current arbitration before the end of December 31, 2014. If as a consequence of the arbitral award, UPMC owes Highmark for overpayments, UPMC shall pay Highmark appropriate

- interest. If an arbitral award is not decided before January 1, 2015, Highmark shall increase its payments by one half the difference the Highmark's April 1, 2015 schedule and its rate schedule in effect before April 1, 2014 for the period January 1, 2015 to December 31, 2015.
- iii. For the period beginning January 1, 2016 to the expiration of the Consent Decree or the expiration of any agreements between UPMC and Highmark for all in network services, whichever is later, the rates shall be the rates agreed to by Highmark and UPMC, or UPMC and Highmark shall engage in a single last best offer binding arbitration to resolve any dispute as to rates after December 31, 2015.
 - iv. Any agreement or award as to rates and fees will be binding on both UPMC and Highmark, meaning that each will bill and make payments consistent with the agreement or award.
4. For rates for UPMC Health Plan patients at Allegheny Health Network hospitals, if those rates are not resolved by current litigation between the Allegheny Health Network and UPMC in the Allegheny Court of Common Pleas, or by agreement between Highmark and UPMC, Highmark and UPMC shall engage in last best offer arbitration to determine those rates for the period not covered by the current litigation to the termination of the Consent Decree.
- a. Non-Rate Term – Disputed terms shall be subject to mediation before the OAG, PID and DOH. If mediation does not result in resolution within 30 days, UPMC and Highmark shall engage in binding arbitration to resolve the dispute as to terms.
5. Key Transition Issue Agreements
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- b. *Vulnerable Populations – UPMC and Highmark mutually agree that vulnerable populations include consumers age 65 or older who are eligible or covered by Medicare, Medicare Advantage, Medigap health plans, Medicaid and CHIP. With respect to Highmark covered vulnerable population, UPMC shall continue to contract with Highmark at in-network rates for all of its hospital, physician and appropriate continuity of care services for CHIP, Highmark Signature 65, Medigap and commercial retiree carve out as long as Highmark does not make unilateral material changes to these programs. UPMC shall treat all Medicare participating consumers as in network regardless of whether they have Medicare as their primary or secondary insurance. Highmark acknowledges that UPMC reserves the right to withdraw from these arrangements if Highmark should take the position that it has the authority to revise the rates and fees payable under those arrangements unilaterally and materially.
- c. *Safety Net – UPMC and Highmark mutually agree to establish a one year safety net beginning January 1, 2015, for any existing UPMC patient and Highmark subscriber (i) who used UPMC physicians and services during the 2014 calendar year, (ii) who are not in continuing course of treatment, and (iii) who are unable to find alternative physicians and services in their locality during the one year period. UPMC and Highmark shall hold such consumers harmless if they continue to use such physicians and services. Rates for the safety net period shall as set forth under the Dispute Resolution Process. The safety net is not a contract extension and neither Highmark nor UPMC or its agents shall characterize it as such.
- d. *Unique/Exception Hospitals/Physicians -Highmark shall negotiate in good faith to reach an agreement with UPMC for hospital, physician and follow-up care services at Western Psychiatric Institute and Clinic, UPMC Bedford, UPMC Venango (Northwest), UPMC/Hamot and UPMC/Altoona and any physician, facility or other provider outside the Greater Pittsburgh area currently owned or acquired in the future by UPMC, or with whom UPMC has an agreement to handle provider contracting, such as, but not limited to, the Kane Hospital, or any other physician or facility determined by DOH to be essential to meet local community needs, by July 15, 2014 or be subject to the Dispute Resolution Process. The agreement shall be for a commercially reasonable period of time as provided in Condition 3 of the UPE order. The Greater Pittsburgh area shall mean the Counties of Allegheny, Beaver, Butler, Washington and Westmoreland. The Children's Final Order will continue in effect.

- e. *ER Services –Highmark shall negotiate in good faith to reach an in network agreement with UPMC on rates and patient transfer protocols for emergency and trauma services for hospital, physician and appropriate continuity of care services at all UPMC and Allegheny Health Network hospitals by July 15, 2014 or be subject to the Dispute Resolution Process. The agreement shall be for a commercially reasonable period of time as provided in Condition 3 of the UPE Order. Highmark shall not balance bill to consumers until the ER services agreement is resolved.
- f. *Local Community Needs – Where UPMC is the provider of services provided locally that the patient's treating physician believes the patient needs and DOH has determined such services are not available from another source, and member is out-of-network, UPMC will not balance bill the member, and Highmark and UPMC shall negotiate a payment that shall not be greater than the out-of-network rates established by this Consent Decree.
- g. *Oncology – Highmark subscribers may access, as if in-network, UPMC services, providers facilities and physicians involved in the treatment of cancer, if a patient's treating physician determines that a patient who is diagnosed with cancer should be treated by a UPMC oncologist and the patient agrees to be so treated. In addition, UPMC and Highmark shall negotiate an agreement for treatment of illnesses which result from cancer treatment. These resulting illnesses may include, but not be limited to, mental health, endocrinology, orthopedics and cardiology. The need for a treatment of a resulting illness shall be determined, in the first instance, by the patient's treating physician acting in consultation with and in accordance with the wishes of the patient or the patient's representative. Moreover, all UPMC joint ventures, physician services provided at or on behalf of, at independent hospitals shall be in-network. If UPMC and Highmark do not reach an agreement on rates for cancer treatment and resulting illnesses by July 15, 2014, the parties will be subject to the Dispute Resolution Process. UPMC shall not balance bill consumers until this agreement is resolved. The agreement shall be for a commercially reasonable period of time as provided in Condition 3 of the UPE Order. Nothing in the treatment protocol shall interfere with a plan design dealing with co-pays and co-insurance for using different providers.
- h. *Referrals and Highmark Transfer of Patients--(a) Highmark shall not require its physicians to refer patients to an AHN Hospital in situations where the patient is covered by a Health Plan that does not participate with such AHN Hospital or otherwise expresses a preference to be referred to a non-AHN Hospital. (b) AHN shall not refuse to transfer a patient, whether for diagnosis or treatment, to a non-

AHN Hospital or Health-Care Provider if such transfer is requested by the patient, the patient's representative when such representative is authorized to make care decisions for the patient, or the patient's physician; provided the patient is stable and that the transfer is medically appropriate and legally permissible. (c) When a patient in need of transfer is covered by a Health Plan with which the AHN Hospital does not contract, AHN shall transfer the patient to the Health Plan's participating non-AHN facility (provided the patient is stable and that the transfer is medically appropriate and legally permissible) unless (i) the patient or the patient's representative expresses a contrary preference after having been informed of the financial consequences of such a decision or (ii) otherwise approved by the patient's Health Plan.

- i. *Out-of-Network Services – For all other Highmark subscribers whose care is not otherwise governed by other provisions in this term sheet, beginning January 1, 2015, UPMC will provide services to all such subscribers on an out-of-network basis. UPMC's reimbursement rates for "out-of-network" services for Highmark subscribers shall be no more than 60% of charges if paid promptly and provided that UPMC informs consumers of such charge before rendering services.
6. *Enforcement of the Consent Decree—The OAG, PID and DOH shall have exclusive jurisdiction to enforce the Consent Decree.
- i. If the OAG, PID or DOH believe that a violation of the Consent Decree has taken place, they shall so advise UPMC and give UPMC 20 days to cure the violation. If after that time the violation is not cured, the OAG, PID and DOH may seek enforcement of the Consent Decree in the Commonwealth Court.
 - ii. Any person who believes they have been aggrieved by a violation of this Final Judgment may file a complaint with the OAG, PID or DOH for review. If after that review, the OAG, PID or DOH believes either a violation of the Final Judgment has occurred or they need additional information to evaluate the complaint, the complaint shall be forwarded to Highmark for a response within 30 days. If after receiving the response, the OAG, PID or DOH, believe a violation of the Final Judgment has occurred, they shall so advise Highmark and give Highmark 20 days to cure the violation. If after that time the violation is not cured, the OAG, PID or DOH may seek enforcement of the Final Judgment in the Commonwealth Court. If the complaint involves a patient in an ongoing course of treatment who must have the complaint resolved in a shorter period, the OAG, PID or DOH may require responses within periods consistent with appropriate patient care.

7. * Cost and Consumer Education Fund and Costs – Highmark and UPMC shall each contribute \$2 million for use by the OAG, PID or DOH for outreach and education purposes during the transition; and to cover Costs, including Attorney's or consultant fees of the OAG, PID and DOH.
8. *Transfer of Services – If any Services covered by this term sheet are transferred or consolidated at one or more AHN Hospitals, the terms of this Consent Decree shall apply to those transferred Services where such Services are transferred or consolidated.
9. *Advertising – Highmark shall not engage in any public advertising that is unclear, or misleading in fact or by implication to consumers.
10. *The term of the Final Decree shall be for 5 years from the date of entry.
11. *Release – Language to be negotiated.
12. Compliance with Laws – Language to be negotiated.

HIGHMARK

BY: _____

COMMONWEALTH OF PENNSYLVANIA

BY: _____

CERTIFICATE OF SERVICE

I, J. Bart DeLone, Chief Deputy Attorney General, do hereby certify that I have this day served the foregoing volume of the Reproduced Record by electronic service via PACFile on all counsel listed on the docket.

/s/ J. Bart DeLone
J. BART DeLONE
Chief Deputy Attorney General

Date: April 30, 2019