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November 2, 2011

Via FedEx

The Honorable Battle R. Robinson
104 West Market Street
Georgetown, DE 19947

Re: Proposed Affiliation of BCBSD, Inc. with Highmark, Inc.

Dear Judge Robinson,

BCBSD, Inc. ("BCBSD"), one of the applicants in the above referenced proceeding, hereby submits the attached proposed condition (the "Community Support Condition") for Your Honor's consideration in connection with the preparation of your Proposed Order and Recommendations pursuant to 29 *Del. C.* § 10126.

BCBSD concurs with the draft Proposed Order and Recommendations (the "Draft Proposed Order") filed by the Delaware Department of Insurance (the "DOI") on October 24, 2011 and requests that the Hearing Officer adopt it as submitted¹ with the exception of the Community Support Condition and supporting text as discussed below. The penultimate section of the Draft Proposed Order, entitled *Findings of Fact; Conclusions of Law; Recommendations*, contains a paragraph 7 ("Paragraph 7"), which has been left largely blank in order to address the Community Support Condition, a condition which BCBSD is proposing for the purpose of addressing BCBSD's ongoing commitment to community and subscriber support following the closing of the proposed affiliation (the "Affiliation").

As you know, the Department of Justice (the "DOJ"), has proposed a condition that would remove \$45 million from BCBSD's surplus to fund a foundation to be used to address Delaware's "unmet healthcare needs," a purpose unrelated to BCBSD's business operations, and unrelated to any of the criteria for evaluating the Affiliation under the Commissioner's October 20, 2010 Pre-Hearing Order or the newly-adopted provisions of 18 *Del. C.* § 6311. For all of the reasons set forth in Mr. Swayze's arguments made before the Hearing Officer, BCBSD maintains its position that granting the DOJ's request is both unnecessary and beyond the

¹ Specifically, we would ask that you incorporate the few additional redlined edits on the DOI's draft that were provided to you on October 28, 2011 in a document entitled *October 28 – Proposed Findings.pdf* that was transmitted to you in an October 28, 2011 e-mail from Brenda Mayrack sent at 9:54 p.m.

authority granted to this tribunal, either under the Insurance Commissioner's pre-hearing order of October 20, 2010 or under the provisions of 18 *Del. C.* § 6311.

BCBSD nonetheless recognizes that, at various times throughout the hearing, there were concerns and questions expressed with regard to the continuity of BCBSD's community support programs after the transaction closes. BCBSD does not agree that the hearing record establishes any threat to the ongoing community support programs BCBSD currently and voluntarily has in place. Nonetheless, BCBSD offers the Community Support Condition set forth in Exhibit A hereto as a condition to be imposed in lieu of that proposed by the DOJ, should the Hearing Officer feel that a condition addressing these issues is appropriate.

BCBSD has discussed the Community Support Condition with both Highmark and the DOI. BCBSD has been advised by each that they are in support of the Community Support Condition.

In furtherance thereof, BCBSD proposes the following language for Paragraph 7 of the Draft Proposed Order:

"I find nothing in the thousands of pages of evidence submitted into the record, or in the three days of testimony taken at the public hearing, that provides any substantial basis to conclude that the assets of BCBSD are at risk of dissipation, waste or conversion as a result of the Affiliation. To the extent there could be any such risk, the multiple conditions proposed by the DOI and agreed to by the Applicants thoroughly ameliorate the same. Moreover, the DOJ's proposed condition would extract \$45 million from BCBSD's surplus and apply it to a purpose unrelated to BCBSD's business operations, effectively removing this amount from BCBSD's surplus. This violates the strictures of 18 *Del. C.* § 6311, which requires the Commissioner to take steps to *preserve* the surplus of BCBSD – not deplete it – in her approval of any change of control transaction. Accordingly, I decline to recommend the condition proposed by the DOJ. In lieu thereof, although on entirely different grounds, BCBSD has, since the close of the record, submitted an additional proposed condition, attached hereto as Appendix F, with respect to a community and subscriber support commitment (the "Community Support Condition") for my consideration should I find that a condition addressing this issue is needed. The Community Support Condition is briefly described as follows:

- BCBSD will provide \$10 million in premium relief to subscribers over the four year period 2012 through 2015.
- BCBSD will enhance its current level of contributions to its donor advised fund, *Blue Prints for the Community*, administered by the Delaware Community Foundation, such that \$20 million are committed over the ten-year period, 2012 through 2021. In conjunction therewith, BCBSD will cause the *Blue Prints for the Community* Advisory Board to be expanded

with three additional members to be appointed by the Governor, Speaker of the House and the President pro tempore of the Senate.

- BCBSD will contribute \$500,000 per year over the ten-year period, 2012 through 2021, towards critical Delaware healthcare workforce development initiatives.
- BCBSD will contribute \$1 million annually for the five year period, 2012 through 2016, to aid in the funding of the Delaware Health Information Network.
- BCBSD will contribute \$500,000 per year, over the ten-year period, 2012 through 2021, to other Delaware community related causes.

The fact that BCBSD, Highmark and the DOI are all supportive of the Community Support Condition obviates any question regarding my authority to recommend the Community Support Condition or the Commissioner's authority to order and enforce the same. Accordingly, I recommend that the Commissioner impose the Community Support Condition, in lieu of the condition proposed by the DOJ, in order to best assure Delawareans that BCBSD will continue to support the health care needs of the Delaware community in a manner that also serves and protects the interests of BCBSD and its subscribers."

Counsel stands ready to answer your questions or to provide any additional information you may need.

Respectfully submitted,



DAVID S. SWAYZE

MWT:bfd

Enclosure

Cc: See attached service list



MICHAEL W. TEICHMAN

IN RE THE PROPOSED AFFILIATION OF BCBSD, INC. AND HIGHMARK, INC.
 SUBSCRIBER/COMMUNITY SUPPORT CONDITION

No.	<u>Conditions (All subject to December 31, 2011 Closing)</u>	<u>Rationale</u>
1	<ul style="list-style-type: none"> • For the five year period beginning in 2012 and ending in 2016, BCBSD will make annual contributions of \$3 million to its donor advised fund administered by the Delaware Community Foundation, <i>Blue Prints for the Community</i> (“BP4TC”), which annual contributions shall subsume BCBSD’s commitment to the Health Service Corporation Task Force in 2007 to make payments to this fund equivalent to the amount it would pay in corporate income taxes, were it subject to such taxes. In years 2017 through 2021, BCBSD shall reduce these annual contributions to \$1 million <i>or</i> that amount it would pay in corporate income taxes, were it subject to such taxes, whichever is higher. • BCBSD will expand the BP4TC Advisory Council to eleven members, and shall assure that at all times, three members are appointees of the Governor, Speaker of the House, and President pro tempore of the Senate respectively. • BCBSD will amend the BP4TC Advisory Council charter to require that its members are Delaware residents. • BCBSD may reduce or suspend payments under this condition if its risk based capital drops below the bottom of the range recommended by BCBSD’s independent actuary. • BCBSD may reduce or suspend payments under this condition to the extent that taxes or assessments of any kind, not currently applicable to BCBSD, are levied on BCBSD. • The DOI may cause BCBSD to suspend or reduce payments under this condition if, in the DOI’s discretion, the financial condition of BCBSD warrants such suspension or reduction. 	<ul style="list-style-type: none"> • This condition is intended to ensure that BCBSD remains committed to supporting the Delaware community following the Affiliation.

<p>2</p> <ul style="list-style-type: none"> • BCBSD shall contribute a total of \$500,000 annually for the ten-year period 2012 - 2021 to invest in health care workforce development initiatives, which in BCBSD's discretion may include, but shall not be limited to: <ul style="list-style-type: none"> ○ Grants to colleges and universities for retraining displaced workers; ○ Expanding nursing and other clinical programs; or ○ Funding various health professional workforce development programs operated or administered by the Delaware Health Care Commission • BCBSD may reduce or suspend payments under this condition if its risk based capital drops below the bottom of the range recommended by BCBSD's independent actuary. • The DOI may cause BCBSD to suspend or reduce payments under this condition if, in the DOI's discretion, the financial condition of BCBSD warrants such suspension or reduction. 	<ul style="list-style-type: none"> • This condition is intended to ensure that BCBSD remains committed to supporting the Delaware community following the Affiliation.
<p>3</p> <ul style="list-style-type: none"> • BCBSD shall contribute a total of \$500,000 annually for the ten-year period 2012 - 2021 to such charitable and community organizations and programs as it determines, in its discretion, will best serve the needs of the Delaware community. • BCBSD may reduce or suspend payments under this condition if its risk based capital drops below the bottom of the range recommended by BCBSD's independent actuary. • The DOI may cause BCBSD to suspend or reduce payments under this condition if, in the DOI's discretion, the financial condition of BCBSD warrants such suspension or reduction. 	<ul style="list-style-type: none"> • This condition is intended to ensure that BCBSD remains committed to supporting the Delaware community following the Affiliation.

4	<ul style="list-style-type: none"> • BCBSD will, on behalf of BCBSD's fully-insured members, commit funding to the Delaware Health Information Network ("DHIN") of \$1 million annually over the five-year period 2012 through 2016. • The DOI may cause BCBSD to suspend or reduce payments under this condition if, in the DOI's discretion, the financial condition of BCBSD warrants such suspension or reduction. 	<ul style="list-style-type: none"> • This condition is intended to ensure that BCBSD remains committed to supporting the interests of Delaware subscribers and the Delaware community following the Affiliation.
5	<ul style="list-style-type: none"> • BCBSD will establish a rate stabilization reserve or other appropriate mechanism, in the amount of \$10 million, which shall be applied to reduce the rate of premium growth for individual and small group subscribers. • It is intended that these funds will be applied over the four year period 2012 through 2015. Further, in order to prevent excessive impact on premiums once the funds are exhausted, BCBSD shall make commercially reasonable efforts to apply the funds approximately as follows: <ul style="list-style-type: none"> ○ \$4 million in 2012; ○ \$3 Million in 2013; ○ \$2 million in 2014; and ○ \$1 million in 2015. • Provided that \$10 million is expended, or designated for expenditure, between 2012 and 2015 on subscriber relief, the actual mechanism for achieving this result, and the precise amount to be expended in each year, shall be at the discretion of BCBSD. • The DOI may cause BCBSD to suspend or reduce expenditures under this condition if, in the DOI's discretion, the financial condition of BCBSD warrants such suspension or reduction 	<ul style="list-style-type: none"> • This condition is intended to ensure that BCBSD remains committed to the interests of Delaware subscribers following the Affiliation.

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