

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,
by MICHELLE A. HENRY,
Attorney General,

Petitioner,

v.

WASHINGTON HEALTH CARE
SERVICES, INC., and
UPMC d/b/a UNIVERSITY OF
PITTSBURGH MEDICAL CENTER,

Respondents.

290 MD 2024
No. M.D.

2024 MAY 30 AM 10:29

COMMONWEALTH COURT
OF PENNSYLVANIA

ASSURANCE OF VOLUNTARY COMPLIANCE

The Commonwealth of Pennsylvania acting in its capacity as *parens patriae* through its Attorney General, Michelle A. Henry (Commonwealth), and the respondents, Washington Health Care Services, Inc., and UPMC d/b/a University of Pittsburgh Medical Center (collectively “Respondents”), enter into the following Assurance of Voluntary Compliance:

WHEREAS, Washington Health Care Services, Inc. (WHS), is a Pennsylvania nonprofit corporation having its principal address at 155 Wilson Avenue, Washington, PA 15301; and

WHEREAS, UPMC d/b/a University of Pittsburgh Medical Center (UPMC) is a Pennsylvania nonprofit corporation having its principal address at 600 Grant Street, Pittsburgh, PA 15219; and

WHEREAS, the Respondents have entered into an Integration and Affiliation Agreement dated October 18, 2023, pursuant to which WHS and UPMC have proposed to merge certain WHS entities into UPMC’s integrated network of services to enable such entities to continue to provide affordable access to quality health care for the communities of Washington and Greene Counties (the “Transaction”); and

WHEREAS, the Commonwealth has investigated the merits of the Respondents' proposed transaction under the Nonprofit Corporations Law, 15 Pa.C.S. §§ 5101 *et seq.*, the Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201-1 *et seq.*, the Solicitation of Funds for Charitable Purposes Act, 10 P.S. §§ 162.1 *et seq.*, the Uniform Trust Act, 20 Pa.C.S. §§ 7101 *et seq.*, the Internal Revenue Code, 26 U.S.C. § 501(r), and the No Surprises Act, 42 U.S.C. § 300, and:

- a. The Commonwealth alleges that under the terms of the proposed transaction, UPMC will become the sole controlling member of The Washington Hospital (TWH) (into which WHS will be merged), which will become UPMC Washington. Washington Health System Greene and Washington Physicians Group (WPG) will become subsidiaries of UPMC Washington;
- b. The Commonwealth alleges that UPMC has previously chosen not to contract with certain health insurance providers, which the Commonwealth believes increases the likelihood of patients being treated on an Out-of- Network basis;
- c. The Commonwealth alleges that patients treated on an Out-of-Network basis may be subject to UPMC Washington's chargemaster rates despite UPMC Washington accepting substantially discounted reimbursements as payment-in-full from In-Network patients;
- d. The Commonwealth alleges that UPMC Washington's receipt of payments from Out-of-Network patients in excess of the amounts normally accepted as payment in full from In-Network patients would constitute unjust enrichment; and

WHEREAS, the Respondents deny the Commonwealth's allegations; and

WHEREAS, the parties desire to resolve amicably the allegations set forth above;

NOW THEREFORE, the parties agree to the following terms and conditions to settle the differences between them:

1. UPMC and UPMC Washington shall continue UPMC's practices of: (a) not sharing the contract rates and terms that UPMC Washington has reached with non-UPMC Health Plan payors with UPMC's Insurance Services Division; and (b) not sharing the contract rates and terms that UPMC Health Plan has reached with UPMC Washington's competitors with UPMC Washington or UPMC's Health Care Services Division. Nothing shall preclude UPMC Washington, UPMC's Health Care Services Division or UPMC's Insurance Services Division from accessing publicly available price transparency or other information.

2. UPMC, on behalf of UPMC Washington, and UPMC on behalf of itself shall follow the procedures in this Paragraph 2 for negotiations of renewals of existing contracts with health care insurers (Health Plans) as well as negotiations of any new Health Plan contracts:

- a. Prior to the expiration of a Health Plan's existing contract with WHS for the furnishing of inpatient and/or outpatient health care services (a WHS Payor Contract), UPMC, on behalf of UPMC Washington, and UPMC Washington on behalf of itself will commence good faith negotiations with the Health Plan for a new Payor Contract with UPMC Washington. If UPMC, UPMC Washington and the Health Plan are unable to reach an agreement on such a contract after one hundred and twenty (120) days of negotiations, the Health Plan may, at its option, by serving a Notice for Arbitration within thirty (30) days of the end of the negotiations period unless a longer time is agreed to by UPMC, UPMC Washington and the Health Plan, commence a Single Last Best Offer Arbitration with UPMC and UPMC Washington as set forth in

Exhibit A to this Assurance of Voluntary Compliance. If no Single Last Best Offer Arbitration is commenced, the Contract shall expire at the end of its term.

- b. UPMC, on behalf of UPMC Washington, and UPMC Washington on behalf of itself shall negotiate in good faith with each Health Plan that is not a party to a Payor Contract with UPMC Washington (such as those seeking to offer a health plan procured through Pennsylvania's health insurance marketplace (pennie.com) serving Washington and Greene Counties, seeking to get approval from CMS to offer a Medicare Advantage Plan for Washington and Greene Counties, or offering a commercial product for either hospital or physician services). If UPMC, UPMC Washington and the Health Plan are unable to reach an agreement on such a contract after one hundred and twenty (120) days of negotiations, the Health Plan may, at its option, by serving a Notice for Arbitration within thirty (30) days of the end of the negotiations period unless a longer time is agreed to by UPMC, UPMC Washington and the Health Plan, commence a Single Last Best Offer Arbitration with UPMC and UPMC Washington as set forth in Exhibit A to this Assurance of Voluntary Compliance.

3. UPMC, on behalf of UPMC Washington, and UPMC Washington on behalf of itself shall not prohibit any Health Plan from placing UPMC Washington in a tiered Health Plan product for the purpose of steering members to other health care providers or require that the Health Plan place a health care provider in any specific tier in a tiered Health Plan product. Notwithstanding the foregoing, UPMC and UPMC Washington shall be permitted to agree to rate discounts in exchange for the inclusion of UPMC Washington in a specific tier of a Health Plan's network products.

4. UPMC, on behalf of UPMC Washington, and UPMC Washington on behalf of itself shall not enter into any agreement with any Health Plan for the provision of health care services by UPMC Washington that would prohibit a Health Plan from complying with any applicable consumer transparency law requiring the disclosure of provider-specific cost and quality information to its enrollees or insureds.

5. UPMC, on behalf of UPMC Washington, and UPMC Washington on behalf of itself shall not enter into any agreement with any Health Plan (including UPMC Health Plan) that includes a "Most Favored Nation (MFN)" provision that guarantees or provides that UPMC Washington or any Health Plan will receive the best payment rate and/or terms that such health care provider or Health Plan gives any other purchaser or payor of the same or substantially the same product or service. UPMC may not renew or extend any WHS Payor Contract without abandoning any term or provision that constitutes an MFN. UPMC shall inform the Commonwealth of the presence of an MFN in any existing WHS Payor Contract by providing a list of such agreements to the Commonwealth not more than sixty (60) days from entry of this Assurance of Voluntary Compliance.

6. UPMC, on behalf of UPMC Washington, and UPMC Washington on behalf of itself shall not require a Health Plan to contract for the services of all or certain UPMC health care providers (other than UPMC-employed or UPMC-controlled physicians providing hospital-based services in the event of a Health Plan contract for services at UPMC Washington or UPMC Greene) in order for that Health Plan to obtain a contract for services with UPMC Washington.

7. UPMC, on behalf of UPMC Washington, and UPMC Washington on behalf of itself shall not enter into any Health Plan contract for healthcare services with UPMC Washington that expressly limits the Health Plan's ability to contract with non-UPMC health care providers. UPMC shall not condition any Health Plan contract for healthcare services with UPMC Washington on a Health Plan's agreement not to contract with any other health care provider.

8. When providing services to an insured, non-contracted patient covered by the No Surprises Act, UPMC Washington providers shall bill and accept as payment in full the amount provided for pursuant to the No Surprises Act, *42 U.S.C. §§ 300gg-131 and 300gg-132*, as amended and subject to the exceptions therein.

9. UPMC, on behalf of UPMC Washington, and UPMC Washington on behalf of itself shall not terminate for any reason other than cause according to the terms of each such contract a WHS Payor Contract prior to the end of the contract term in effect at Closing. For purposes of this Agreement, WHS Payor Contracts with an automatic renewal or “evergreen” provision rather than a fixed term will be kept in place for at least one (1) year from the Closing. Notwithstanding anything in this Paragraph 9, UPMC shall not be in violation of this Assurance of Voluntary Compliance and shall have no further obligations under this Paragraph 9 with respect to any Health Plan in the event that the Health Plan’s consent is necessary for the continuation of its WHS Payor Contract after Closing and such consent is not given.

10. Consistent with the Emergency Medical Treatment and Labor Act, *42 U.S.C. § 1395dd*, UPMC Washington shall provide a medical screening examination and, as applicable, stabilizing services to all patients who present to its emergency department for emergency medical services without regard to ability to pay. Once patients are stabilized, UPMC Washington may work with patients, those who make health care decisions on their behalf, and their insurers to transfer to patients to other providers as may be appropriate.

11. UPMC and UPMC Washington shall ensure that UPMC Washington health care providers shall comply with their obligations under all applicable federal and state price transparency laws.

12. UPMC will honor all existing employment contracts between TWH or WPG and physician providers for their stated terms, subject to legal requirements. With respect to

any renewals of such employment contracts, and for any new contracts with physicians employed by UPMC Washington or WPG, UPMC and UPMC Washington shall not impose non-compete terms more restrictive than the terms imposed in TWH's and WPG's current employment contracts, subject to legal requirements. Neither TWH nor WPG have any non-competes in any employment agreements with nurses. UPMC and UPMC Washington shall not change this practice. As for the few TWH and WPG non-medical employees who have non-compete terms in their employment agreements, UPMC and UPMC Washington shall not impose non-compete terms more restrictive than those imposed in TWH and WPG's current employment contracts, subject to legal requirements.

13. UPMC Washington and, to the extent within the control of UPMC and UPMC Washington, the physicians who practice at UPMC Washington shall remain accessible to persons in Washington and Greene Counties. UPMC Washington will provide a level of Charity Care that is fully compliant and consistent with UPMC's system-wide patient financial assistance policy, but that in no event is any more restrictive or more limited than the patient financial assistance policy in place at WHS at the time of this Assurance.

14. UPMC, on behalf of UPMC Washington, and UPMC Washington on behalf of itself agree that any restricted or special purpose funds will be utilized according to the respective restrictions or purposes thereof, as applicable.

15. This Assurance of Voluntary Compliance shall expire on the tenth (10th) anniversary of the Closing.

16. This Assurance of Voluntary Compliance releases UPMC and UPMC Washington for any and all claims the Office of Attorney General may have had in connection with its Antitrust, Charitable Trust and Organizations, and Health Care Sections' review of the Respondents' Transaction and no other investigation or claim not specifically released hereby.

17. Any of the above provisions may be deleted, modified, or amended, in whole or in part with the written mutual consent of the parties. Any amendments by consent shall be reflected in an amended assurance filed with the court.

18. Nothing contained herein shall be deemed to constitute an admission by any party of any wrongdoing, guilt or liability on the part of Respondents, nor any lack thereof, with regard to the merits of the allegations contained herein. This Assurance of Voluntary Compliance has been entered into by the consent of all parties for settlement purposes only.

19. Nothing contained herein shall be construed or considered to limit the Commonwealth from enforcement of any provision of this Assurance of Voluntary Compliance, nor restrict the Commonwealth from securing any other measure of damages, including, but not limited to, pecuniary damages as they may lie pursuant to a breach of any condition of this Assurance of Voluntary Compliance.

20. This instrument embodies the whole agreement between the parties, contains all promises, terms, conditions or obligations between the parties and shall supersede all previous communications, representations or agreements, either verbal or written.

21. This Assurance may be executed in any number of counterparts and by different signatories on separate counterparts, each of which shall constitute an original counterpart hereof and all of which together shall constitute one and the same document. One or more counterparts of this Assurance may be delivered by facsimile or electronic transmission with the intent that it or they shall constitute an original counterpart hereof.

22. The Commonwealth Court of Pennsylvania shall maintain jurisdiction over the subject matter of this Assurance of Voluntary Compliance and over Respondents for enforcement purposes.

WHEREFORE, intending to be legally bound, the parties have hereunto set their hands and seals.

FOR THE COMMONWEALTH:

MICHELLE A. HENRY,
Attorney General

Date:

5/28/24

By:



MICHELLE A. HENRY
Attorney General

JAMES A. DONAHUE, III
First Deputy Attorney General

MARK A. PACELLA
Executive Deputy Attorney General
Public Protection Division

TRACY W. WERTZ
Chief Deputy Attorney General
Antitrust Section

GENE J. HERNE
Chief Deputy Attorney General
Charitable Trusts and Organizations Section

GEOFFREY HALE
Chief Deputy Attorney General Health
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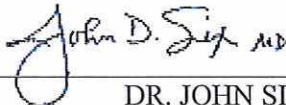
BY THE RESPONDENTS:

WASHINGTON HEALTH CARE SERVICES, INC.,

By: 
DAN MILLER, Board Chair


Brook T. Ward
BROOK WARD, Chief Executive Officer and President

Attest:


DR. JOHN SIX, Executive Vice President
Chief Operating Officer and Chief Medical Officer

Date: May 24, 2024

CLIFFORD CHANCE US LLP


By: 
LEIGH OLIVER, Esquire
2001 K Street NW
Washington, DC 20006-1001
Counsel for Washington Health Care Services, Inc.

Date: May 24, 2024

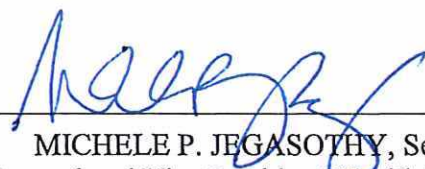
**UPMC d/b/a UNIVERSITY OF PITTSBURGH
MEDICAL CENTER,**

By: 

MARK TAMBURRI, Executive Vice President and
Chief Legal Officer


J.C. STILLEY, Senior Vice President
Chief Investment Officer and Treasurer

Attest:


MICHELE P. JEGASOTHY, Senior Associate
Counsel and Vice President, Health Service Group,
Corporate Legal Department; and Corporate Secretary

Date: May 24, 2024

AXINN, VELTROP & HARKRIDER LLP

By: 

LISL DUNLOP, Esquire
114 West 47th Street
New York, NY 10036
Counsel for UPMC d/b/a University of
Pittsburgh Medical Center

Date: May 24, 2024

EXHIBIT A

SINGLE LAST BEST OFFER ARBITRATION PROCEDURES

I. INITIATION

Health Plan may initiate binding arbitration upon satisfaction of the conditions precedent set forth in the Assurance of Voluntary Compliance at Paragraphs 2(a) or 2(b) by filing a Notice for Arbitration with the American Arbitration Association, Health Care Section.

II. ARBITRATION PROCEDURES

A. Procedural Rules

The Parties agree that the arbitration shall be governed by the AAA Healthcare Payor Provider Arbitration Rules in effect at the time of the proceeding except where such rules conflict with the agreed rules set forth herein, in which case the rules of this Exhibit A shall control.

B. Case Administration

The Parties agree that the AAA shall act as the Administrator for the arbitration.

III. ARBITRATORS

A. Selection of Arbitrators

1. Within ten (10) days after receiving a Demand for Arbitration, the Administrator will provide the parties with a list of seven (7) arbitrators.
2. The Arbitrators must complete the Arbitrator Disclosure Checklist within ten (10) days of their selection.
3. Each Arbitrator on the list of seven arbitrators must be independent and neutral, and must possess the requisite experience described in Part III.B below. If any party believes that a selected Arbitrator is not independent and neutral, or lacks the requisite experience, that party may petition the Administrator, in writing, to disqualify the Arbitrator. Any such petition for disqualification must be filed within ten (10) days of the Arbitrator Disclosure Checklist of the challenged Arbitrator. If any Arbitrator is disqualified, the Administrator will select a replacement from the AAA roster of arbitrators until a list of seven qualified, independent and neutral Arbitrators is compiled.
4. Health Plan and UPMC/UPMC Washington will then each be granted two (2) strikes from the list of seven Arbitrators. Health Plan and UPMC /UPMC Washington will separately identify the two (2) arbitrators they wish to strike and will rank the remaining five arbitrators sequentially in order of preference. The most highly desired candidate should be ranked

“1,” the second choice should be ranked “2,” etc. If the strikes exercised by Health Plan and UPMC/UPMC Washington contain no duplicate names, the remaining three (3) Arbitrators will serve as the Panel for the single last best offer binding arbitration. If the strikes exercised by Health Plan and UPMC/UPMC Washington contain a duplicate name or names, the Arbitrator with the highest combined score will be stricken from the list, until three arbitrators remain to serve as the Panel.

5. The three Arbitrators shall appoint from among them a Chairperson within fifteen (15) days of confirmation of the Panel. If no appointment is made within that time or any agreed extension, the AAA shall appoint the Chairperson.
- B. To be qualified, an Arbitrator shall have at least ten (10) years’ experience in the negotiation of contracts, rates and payments between health plans and healthcare providers and/or between health plans and health plan purchasers.
- C. In addition and not contrary to the Rules established herein, at the request of any party, the Arbitrators may take any interim measures deemed necessary with respect to the dispute to further the purpose of these proceedings.

IV. DISCOVERY & PRE-ARBITRATION PROCEDURE

A. Confidentiality

1. The arbitration shall be a confidential proceeding. The Arbitrators shall establish rules for confidentiality and exchange of information designed to ensure fairness for all Parties involved. The Arbitrators and the Parties shall ensure that confidential, competitively-sensitive information shared for the purposes of this Arbitration is not disclosed or otherwise disseminated to any third Parties, including, but not limited to other Health Plans or hospitals; in particular Health Plans or hospitals that are part of UPMC/UPMC Washington or Health Plan. Further, all such confidential information shall not be used by the Parties for any other purpose apart from this Arbitration process.
2. Nothing in these Rules is designed to contravene any applicable privilege, including, but not limited to:
 - a. Attorney-client privilege
 - b. Peer review privilege
 - c. Patient-physician privilege

B. Initial Disclosures

Within fifteen (15) days after the Answer is filed, UPMC/UPMC Washington and Health Plan shall exchange Initial Disclosures containing the following:

1. Identification of persons likely to have information that the disclosing party may use to support its claims or defenses
2. Identification and qualification of expert witnesses

C. Discovery

Fact and expert discovery procedures will be agreed upon by the Parties. In the event that the Parties cannot agree, the arbitrators will mandate reasonable and streamlined discovery procedures necessary for an efficient and expeditious resolution of the dispute.

D. Proposal for Rates and Terms

1. Initial Offer: Fifteen (15) days after the close of fact discovery, each party shall disclose its initial offer for proposed rates and terms ("Initial Offer").
2. Best and Final Offer: Seven (7) days after the close of expert discovery, each party shall disclose its best and final offer for proposed rates and terms ("Best and Final Offer"). Each party shall be bound by its Best and Final Offer. No amendments, changes or revisions shall be made to the Best and Final Offer without leave from the Arbitrators. Nonetheless, each party expressly reserves their rights to take further expert discovery, to the extent necessary.

E. Pre-Arbitration Brief

1. Fifteen (15) days after the close of expert discovery, UPMC/UPMC Washington and Health Plan shall each submit to the Arbitration Panel and all Parties a Pre-Arbitration Brief setting forth in full the arguments and evidence in support of its proposed rates and terms, and to the extent necessary, challenging the proposed rates and terms of the opposing party. This Brief shall also contain any challenges to a proposed experts experience and expertise, or the method used to support the proposed rates and terms.
2. The Pre-Arbitration Brief shall also identify any exhibits the Parties may seek to introduce as evidence and witnesses the Parties intend to call to testify.
3. As part of the brief each party will identify the issues which have been agreed to and those which remain in dispute.

Without leave from the Arbitrators, the Pre-Arbitration Brief shall not exceed thirty (30) pages.

V. ARBITRATION PROCEEDINGS

A. Time & Place

The arbitration proceedings shall take place at a time mutually agreed upon by all Parties and the Arbitrators. If the Parties cannot agree on such matter, the time of the proceedings shall be fixed by the Arbitrators. The proceedings shall take place no more than ten (10) days after submission of the Pre-Arbitration Briefs. The proceedings will be held in Pittsburgh, Pennsylvania.

B. Record of Proceedings

The Arbitration Proceedings shall be transcribed by a sworn court reporter. The cost of the court reporter and preparation of the record shall be borne equally by UPMC/UPMC Washington and Health Plan.

C. Presentation of Arguments and Evidence

1. Each party shall have the opportunity to give an opening statement and a closing argument.
2. Each party will be given the opportunity to present evidence and witness testimony in support of their proposed rates and terms. The Arbitrators maintain the sole discretion in determining the relevance and materiality of the evidence offered, and any decision by the Arbitrators need not be governed by the Pennsylvania Rules of Evidence.
3. The opposing party shall have the opportunity to cross-examine any witness testimony and otherwise offer rebuttal testimony in support of its position.

D. Alteration of Proceedings

The Arbitrators shall have the right to alter these proceedings as they deem necessary, but shall afford each party a full, fair and reasonable opportunity to support its position and challenge the position of the opposing party.

VI. POST-ARBITRATION BRIEF

- A. No more than fifteen (15) days from the close of the Arbitration Proceedings, each party may submit a Post-Arbitration Brief in support of its proposed rates and terms.
- B. Post-Arbitration Briefs may include references to evidence or testimony entered at the Arbitration Proceedings.
- C. Without leave from the Arbitrators, the Post-Arbitration Brief shall not exceed thirty (30) pages.

VII. DECISION

- A. No more than fifteen (15) days from submission of Post-Arbitration Briefs, the panel shall issue a decision, in writing, without opinion, selecting the single last best offer that best reflects competitive rates, terms and conditions for healthcare services rendered by UPMC Washington and fair market value for services rendered by UPMC Washington. The panel shall select only one of the offers of either Health Plan or UPMC/UPMC Washington and shall not impose its own rates or terms onto the Parties.
- B. The Parties shall be bound by the decision of the Arbitrators, which shall not be subject to further amendment.

VIII. COSTS

The Parties shall each bear their own costs arising from the Arbitration process and shall bear one-half of any other costs associated with the Arbitration process, including, but not limited to) the Arbitrators' fees.

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provision of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.



Mark A. Pacella

Executive Deputy Attorney General

May 28, 2024

CERTIFICATE OF SERVICE

I, Mark A. Pacella, counsel for the Commonwealth, hereby certify that I served true and correct copies of the foregoing *Assurance of Voluntary Compliance* via electronic mail upon the following:

Leigh Oliver, Esquire
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Washington, DC 20006-1001

leigh.oliver@cliffordchance.com

(Counsel for Washington Health Care Services, Inc.)

Lisl Dunlop, Esquire
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(Counsel for UPMC)



Mark A. Pacella

Executive Deputy Attorney General

May 28, 2024