STATE OF MISSISSIPPI

Office of the Governor

EXECUTIVE ORDER 1327

WHEREAS, on or about June 25, 2013, Blue Cross & Blue Shield of Mississippi ("BCBS"), a licensed Mississippi health insurance company that serves nearly one million Mississippians, announced that it was terminating its contracts with ten Mississippi hospitals, thereby excluding the hospitals from the BCBS network of providers. Those hospitals are Natchez Community Hospital, Northwest Mississippi Regional Medical Center (Clarksdale), Biloxi Regional Medical Center, Madison River Oaks Medical Center (Canton), Gilmore Memorial Regional Medical Center (Amory), Tri-Lakes Medical Center (Batesville), Central Mississippi Medical Center (Jackson), Crossgates River Oaks Hospital (Brandon), River Oaks Hospital (Flowood), and Woman's Hospital (Flowood) (hereinafter, collectively, the "affected hospitals"). The apparent reason for the terminations, which took effect at the end of August 2013, was the hospitals' decision to file a lawsuit against BCBS approximately one week earlier. That lawsuit, which involves a dispute over payments under the parties' former contracts, remains pending in Circuit Court and is unaffected by this Executive Order; and

WHEREAS, tens of thousands of Mississippians, many of whom are enrolled in BCBS plans, have come to depend on these hospitals and their associated physicians, nurses, and other professional staff for critical medical care; and

WHEREAS, BCBS is the dominant private insurer in the State of Mississippi in the large group, small group, and individual insurance markets, with at least one independent analysis concluding that it possesses market shares of 81%, 73%, and 57% in those respective markets, outpacing its closest competitor by a wide margin in each case; in addition, BCBS is the third-party administrator for the State and School Employees Health Insurance Plan, which covers over 200,000 employees and dependents; and

WHEREAS, in issuing this Executive Order, I considered testimony from the August 16, 2013 Joint Legislative Hearing before the House and Senate Insurance Committees, including:

- Dr. Chris Glick is a highly respected neonatologist with more than thirty years of experience. She practices not only at affected hospitals in the Jackson area but also at other hospitals that remain in the BCBS network. Dr. Glick testified about a number of specialized services that River Oaks Hospital and Woman's Hospital provide for premature, high-risk babies and new mothers that, in her view, cannot be replicated at other hospitals in the area. *See* Joint Leg. Hearing Tr. 22–28. She testified that the affected hospitals' exclusion from the BCBS network will "reduce the level of care and quality of care that [her] patients will receive." *Id.* at 26. Dr. Glick also concluded, based on available data, that other hospitals in the Jackson area simply "don't have room for all the babies" born at the local affected hospitals—in particular, all of the babies that require treatment in the neonatal intensive care unit (NICU). *Id.* at 28–29. According to Dr. Glick: "*If you want your wives and your daughters to labor in the hallway and deliver babies in the hallway of a hospital, let [the affected hospitals] get closed. That's what's going to happen.* There's not room. There's not personnel. There's not equipment to take care of all the … babies that would have to be delivered [elsewhere]. It's just … insane. It just doesn't make sense." *Id.* at 29 (emphasis added).

- Dr. Joe Bailey is a leading gastroenterologist at Gilmore Memorial Regional Medical Center in Amory who has practiced in northeast Mississippi for thirty-six years. He is also the founder of a nationally recognized, 100% volunteer clinic that has provided free medical and dental care to over 10,000 Mississippians. Dr. Bailey explained that many of his BCBS patients are "postponing their care," hoping that they can see him whenever his hospital's dispute with BCBS "is resolved." *Id.* at 33. "And, in the meantime, they don't get screenings and they don't investigate new symptoms. *Some of these people are going to get sick and some of them may die because Blue Cross made a business decision.*" *Ibid.* (emphasis added). Dr. Bailey testified that his specialty is already "woefully under-serviced in northeast Mississippi." *Ibid.* Therefore, if his existing patients cannot see him, it will take them "months to get an appointment and many of them simply will not go." *Ibid.* He further testified that 383 companies in and around Amory are insured by BCBS and that "the hospital … may very well have to close" if it continues to be excluded from the network. *Id.* at 34.

- Dr. Shani Meck is a highly regarded OB / GYN whose office is located at River Oaks Hospital in Flowood. She estimated that 50% of her patients have BCBS insurance and, as a result, she will have to move their deliveries from River Oaks to other area hospitals. *Id.* at 41–42. However, like Dr. Glick, she testified that "there are not enough beds" at other hospitals, and she explained the facts on which she based her conclusion. *Id.* at 42. In fact, she stated that another (still in-network) hospital had recently warned her that its maternity ward was "busting at the seams." *Id.* at 43. She said, "We are going to end up laboring patients in rooms that are not meant for laboring. *It's going to be a mess.*" *Id.* at 45 (emphasis added). She also testified that the hospitals' exclusion would undermine "continuity of care" by unnecessarily requiring patients to deliver babies with unfamiliar doctors at unfamiliar hospitals. *Id.* at 44.

- Dr. Michael Havens is a physician at Tri-Lakes Medical Center in Batesville, a hospital that he and four other local physicians led out of bankruptcy just four years ago. *Id.* at 47. Dr. Havens also testified that the dispute between BCBS and his hospital is "greatly impacting the welfare of the citizens of this state" and is a threat to his hospital's ability to survive. *Id.* at 47–49.

WHEREAS, I have also considered that one of the affected hospitals, the Central Mississippi Medical Center in Jackson, is the home of the State's only inpatient Burn Center and during the most recent regular legislative session, the care and treatment provided at the Burn Center was deemed sufficiently important to the State's healthcare system that both houses of the Legislature overwhelmingly passed and I signed into law a bill designed specifically to facilitate reimbursement for such treatment, Senate Bill 2780 (2013 Regular Session); and

WHEREAS, I have also considered the fact that some of the affected hospitals are located in cities in which there is no other hospital, such as Clarksdale, Amory, Canton, and Batesville; and

WHEREAS, I have also considered that five of the hospitals are located in the Jackson metropolitan area, and while there are certainly other hospitals in the area, I am unconvinced that the remaining hospitals can provide adequate services to all of their existing patients and the influx of new patients that would result from the permanent exclusion of the affected hospitals from the BCBS network; and

WHEREAS, it appears that BCBS payments represent a significant percentage of the affected hospitals' total revenues—even greater than the total payments these hospitals receive under the State Medicaid Program—and, therefore, that their exclusion from the BCBS network threatens the continued viability of some or all of these hospitals that provide critical medical care to tens of thousands of Mississippians; and

WHEREAS, in issuing this Executive Order, I have also considered concerns expressed by local elected officials, state legislators, and other constituents, who have urged the executive department to intervene to address this potential crisis, such as a recent plea signed by eight local elected officials and seven legislators (including the Chairman of the Senate Public Health and Welfare Committee) which raised many of the issues discussed above and asked me "to take the necessary action to get these hospitals put back in the Blue Cross network"; and

WHEREAS, I have also considered the comments of the Chairman of the House Insurance Committee at the conclusion of the above-discovered Joint Legislative Hearing, suggesting that the current situation may illustrate the need for a state "any willing provider" statute, such as a number of other states have adopted, which attempts to protect patient access and choice by prohibiting an insurer, such as BCBS, from excluding a provider willing to meet the basic terms and conditions of its network, Joint Leg. Hearing Tr. 73–74; and

WHEREAS, until recently, BCBS itself appeared to consider the ten affected hospitals to be a necessary part of the BCBS network and terminated them only after the hospitals filed a lawsuit against BCBS; and

WHEREAS, BCBS has now publicly acknowledged that the exclusion of the ten hospitals was based not on any careful or deliberate consideration of the adequacy of the remaining BCBS network but rather was done in response to the lawsuit, *see* BCBS News Release, Oct. 14, 2013; Joint Leg. Hearing Tr. 53; and

WHEREAS, BCBS has also publicly acknowledged that "it was willing to re-contract with some [of the affected] hospitals" only if the hospitals "would permanently dismiss" their lawsuit, BCBS News Release, Oct. 14, 2013; and

WHEREAS, the ongoing litigation is irrelevant to the question whether the hospitals' inclusion in the BCBS network is necessary to provide the statutorily required access to care; and

WHEREAS, within the last week BCBS has publicly offered to reinstate the Network Provider Agreements with four of the affected hospitals,* without prejudice to the hospitals' legal claims and on the same terms under which they previously operated; and

WHEREAS, in making this public offer, BCBS announced that it was taking a "leadership role" "to take the necessary action for these [four] hospitals that provide a unique service to their community," BCBS News Release, Oct. 14, 2013; however,

WHEREAS, it is my understanding that those hospitals have been unwilling to sign BCBS's offer for the stated reason that its actual terms allegedly do not match BCBS's public representations; and

WHEREAS, the parties' apparent inability to resolve even this comparatively limited issue threatens harm to the patients of these four affected hospitals; and

WHEREAS, based on data presently available, including all of the foregoing considerations, I have determined that BCBS's exclusion of the hospitals from the BCBS network of providers threatens patients' access to care and raises other serious legal issues, as stated below; and

WHEREAS, the Mississippi Patient Protection Act of 1995, Miss. Code Ann. § 83-41-401 *et seq.*, provides that a managed care plan shall be neither offered nor provided to persons residing in the State of Mississippi unless, among other requirements, the plan can "[d]emonstrate that its provider network has providers of sufficient number throughout the service area to assure reasonable access to care with minimum inconvenience by plan enrollees," *id.*, § 83-41-409(b); and

WHEREAS, in the federal lawsuit that it filed last week, BCBS asserts that access to care is not imperiled because BCBS members "may go to any hospital they desire," Complaint ¶ 25, but this argument ignores that state law requires BCBS to maintain a *network* that, in and of itself, "has providers of sufficient number throughout the service area to assure reasonable access to care with minimum inconvenience by plan enrollees," Miss. Code Ann. § 83-41-409(b); and

WHEREAS, BCBS's admission that, as a litigation tactic, it excluded at least four hospitals that—in BCBS's own view—each "provide a unique service to their community" is tantamount to an admission that it was in violation of the Act with respect to these four hospitals for more than six weeks, *see* BCBS News Release, Oct. 14, 2013; and

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* The four are Northwest Mississippi Regional Medical Center (Clarksdale), Gilmore Memorial Regional Medical Center (Amory), Tri-Lakes Medical Center (Batesville), and Woman's Hospital (Flowood).

WHEREAS, BCBS's decision to exclude all ten affected hospitals in response to a lawsuit and its subsequent concession that at least four of these hospitals provide unique services to patients such that they should be part of the BCBS network also casts serious doubt on the propriety of the exclusion of the remaining six hospitals; and

WHEREAS, BCBS's exclusion of the ten affected hospitals from its networks has threatened and continues to threaten BCBS enrollees' statutory rights to enjoy "reasonable access to care with minimum inconvenience," Miss. Code Ann. § 83-41-409(b); and

THEREFORE, a hearing on that issue should be held pursuant to Miss. Code Ann. § 83-41-405; and

WHEREAS, Mississippi law also provides that no insurer "shall engage … in any trade practice which is … an unfair or deceptive act or practice in the business of insurance," *id.*, § 83-5-33; and

WHEREAS, the law provides that an insurer should be ordered to cease and desist such unfair or deceptive acts or practices, *see id.*, § 83-5-41 and § 83-5-45; and

WHEREAS, there is reason to believe that BCBS's exclusion of the ten affected hospitals from its networks—and the resulting reduction in access to care—may constitute an unfair or deceptive act or practice in the business of insurance; and

THEREFORE, a hearing on that issue should be held pursuant to Miss. Code Ann. § 83-5-39 and/or § 83-5-45; and

WHEREAS, Mississippi law also provides generally that an insurer's authority to do business in this State requires it "to comply with any provision of law obligatory on it," *id.*, § 83-5-17; and

WHEREAS, in addition to the other statutes cited above, BCBS's exclusion of the ten affected hospitals from its networks and related conduct raises concerns under the Mississippi antitrust laws, *e.g.*, Miss. Code Ann. § 75-21-1 and § 75-21-3; and

THEREFORE, a hearing on those issues should be held pursuant to Miss. Code Ann. § 83-5-17; and

WHEREAS, the Department of Insurance has advised me that it is in the process of reviewing the hospitals' exclusion from the BCBS network but is not yet in a position to take definitive action or hold hearings on the subject; and

WHEREAS, pursuant to the Mississippi Constitution, the "chief executive power of this state shall be vested in a Governor," MISS. CONST. art. 5, § 116, which necessarily includes the whole of the executive power not vested in the other constitutional state officers, *Alexander v. State by and through Allain*, 441 So. 2d 1329, 1344 (Miss. 1983); and

WHEREAS, the Constitution mandates that in the exercise of his chief executive power, "[t]he governor shall see that the laws are faithfully executed," MISS. CONST. art. 5, § 123, and "[t]he power of the State is at his command for this purpose," *Vicksburg & Meridian R.R. Co. v. Lowry*, 61 Miss. 102 (1883); *see also Hood ex rel. State Tobacco Litig.*, 958 So. 2d 790, 804 (Miss. 2007) ("[T]he Governor is under a solemn duty to act to assure faithful execution of our laws."); and

WHEREAS, the Mississippi Supreme Court has held:

> The constitutional and statutory provisions requiring the Governor to see that the laws are executed have no obscure or technical meaning; neither were they intended as a mere verbal adornment of his office. They mean what is in the ordinary import of the language used, to wit, that the laws shall be carried into effect, that they shall be enforced.

State v. McPhail, 180 So. 387, 389 (Miss. 1938) (citation omitted); and

WHEREAS, further, the Legislature has expressly recognized that the Governor's constitutional chief executive power includes the authority and obligation "to supervise the official conduct of

all executive … officers" and "to see that … the duties of [all] offices are performed or, in default thereof, apply such remedy as the law allows," Miss. Code Ann. § 7-1-5(d)–(e); and

WHEREAS, the Constitution also provides that "[t]he governor may require information in writing from the officers in the executive departments of the state on any subject relating to the duties of their respective offices," MISS. CONST. art. 5, § 120; *see also* Miss. Code Ann. § 7-1-5(k) ("He may require any officer … to make special reports to him upon demand in writing."); and

THEREFORE, because I have determined that the issues described herein should be the subject of an administrative hearing or, at minimum, the subject of a thorough and complete investigation by the Department of Insurance, I have determined that it is my constitutional duty and obligation to see that the laws are executed and to order that a hearing be held or, alternatively, a detailed written report as to why no hearing should be held; and

WHEREAS, I have determined that unless I take immediate action, affected patients are threatened with irreparable harm and loss of the "reasonable access to care with minimum inconvenience" to which they are statutorily entitled, Miss. Code Ann. § 83-41-409(b); and, further, that the irreparable harm would be such that it would frustrate my constitutional duty to see that the laws are faithfully executed and prevent the executive branch from rendering a meaningful decision on the merits and remedying any violations of the law; and

THEREFORE, even though final determination of the legal issues described herein must await a full hearing on the merits, I have determined that interim relief is necessary to protect the affected patients and ensure the faithful execution of the laws of the State of Mississippi.

NOW, THEREFORE, I, Phil Bryant, Governor of the State of Mississippi, pursuant to the authority vested in me by the Constitution and laws of the State of Mississippi, and in the public interest, do hereby **ORDER** as follows:

1. The Department of Insurance shall promptly complete its inquiry into the hospitals' exclusion from the BCBS network, including promptly and thoroughly investigating the issues described herein. If the Department determines that access to care has been imperiled, that there is reason to believe that unfair or deceptive acts or practices have been committed, or that there have been any other violations of applicable laws in connection with this matter, then the Department shall convene a hearing. The hearing shall be conducted in a manner consistent with the above-cited statutes, as applicable. Following the hearing, the Department shall render its decision.

2. If, after thoroughly investigating this matter, the Department concludes that there have been no violations of the law, then the Department shall submit a report, in writing, explaining the basis for its conclusions. The report shall be submitted regardless of whether a hearing is held and shall address in detail all of the issues described herein, including patient access to care, whether unfair or deceptive acts or practices have been committed, and whether the hospitals' exclusion from the BCBS network raises any antitrust issues. *See* MISS. CONST. art. 5, § 120; Miss. Code Ann. § 7-1-5(k).

3. The Department shall complete all steps described in Sections 1 and 2, above, as soon as practicable and no later than 60 days from the date of this Executive Order.

4. For the duration of this Executive Order, BCBS and the ten affected hospitals shall return to the status quo as it existed prior to BCBS's exclusion of the hospitals from its network. That is, each hospital shall be considered an "in network" provider for purposes of all BCBS plans for which it was previously "in network"—and no patient enrolled in those plans should be required to pay "out-of-network" charges for treatment or care at these facilities. Further, for the duration of this Order, BCBS and the hospitals shall proceed according to the terms of their most recent contracts, as interpreted and applied by BCBS at the time the contracts were terminated. That is, for the duration of this Order, BCBS may continue to apply its interpretation of any disputed contractual provisions at

issue in the parties' lawsuit—and, for the duration of this Order, the affected hospitals must return to the BCBS network and must accept those interpretations. Further, as noted above, BCBS has publicly represented that it has, in effect, already made this offer with respect to the four affected hospitals listed in the footnote above. Therefore, accepting these public representations as true, and as a condition precedent to the remainder of this Section 4 taking effect, those four affected hospitals shall accept their respective offers.

5. This Executive Order has no effect on the pending litigation between the hospitals and BCBS, and I express no opinion on the merits of that lawsuit, which will be settled by the parties themselves or decided by the courts. Further, BCBS's compliance with the terms of this Order shall not give rise to any claim by the hospitals for alleged underpayments or any other alleged damages. The hospitals' acceptance of this provision is a condition precedent to their inclusion in the BCBS network pursuant to this Order.

6. Either the Attorney General or the Department of Insurance may initiate additional investigations or proceedings related to the issues described herein, provided that any such investigations or proceedings shall be consistent with, and shall not interfere with, the terms of this Executive Order.

7. Unless terminated sooner by a subsequent executive order, the provisions of Section 4 of this Executive Order shall expire seven days from the date on which the Department of Insurance renders the final decision or submits the final report required by Section 1 or Section 2 of this Order.

The hospitals and BCBS shall comply with the provisions of this Executive Order on or before October 29, 2013.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Mississippi to be affixed.

DONE at the Capitol, in the City of Jackson, this the 22nd day of October in the year of our Lord two thousand and thirteen, and of the two hundred and thirty-eighth year of the United States of America.

PHIL BRYANT
GOVERNOR

BY THE GOVERNOR

C. DELBERT HOSEMANN, JR.
SECRETARY OF STATE