

STATE OF NORTH CAROLINA
DURHAM COUNTY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
23 INS 00738

BLUE CROSS AND BLUE SHIELD OF)
NORTH CAROLINA,)
)
Petitioner,)
)
v.)
)
NORTH CAROLINA STATE HEALTH)
PLAN FOR TEACHERS AND STATE)
EMPLOYEES,)
)
Respondent.)

MOTION TO INTERVENE BY AETNA LIFE INSURANCE COMPANY

NOW COMES Aetna Life Insurance Company (“Aetna”), who by and through undersigned counsel and pursuant to N.C. Gen. Stat. §§ 1A-1, Rule 24, 150B-23(d), and 26 N.C.A.C. 3 .0117, files this motion to intervene in the above-captioned contested case. In support of this motion, Aetna respectfully shows the following:

I. FACTUAL AND PROCEDURAL BACKGROUND

1. On August 30, 2022, Respondent North Carolina State Health Plan for Teachers and State Employees (“Plan”) issued Request for Proposal No. 270-20220830TPAS (“RFP”) for a contract to provide third-party administrative services for the Plan (“TPA Contract”), which provides health care coverage to nearly 750,000 teachers, state employees, retirees, and their dependents.

2. Three vendors submitted responses to the RFP: Aetna; UMR, Inc.; and Petitioner Blue Cross and Blue Shield of North Carolina (“BCBSNC”).

3. On December 14, 2022, the Plan awarded the TPA Contract to Aetna (“Award”), displacing BCBSNC as the incumbent vendor.

4. The implementation period for the TPA Contract is January 1, 2023 to December 31, 2024. Aetna will begin providing services to the Plan's members on January 1, 2025. Aetna began performance of the TPA Contract on January 4, 2023.

5. To date, Aetna has engaged in various and extensive implementation activities necessary to enable the Plan to transition to a new third-party administrator successfully and efficiently on January 1, 2025. Since January 4, 2023, Aetna has been in communication with the Plan on an almost daily basis to coordinate implementation and has built a core team consisting of over 25 Aetna employees engaged in supporting implementation of the Plan. Collectively, this core team has devoted over 400 hours per week to the TPA Contract addressing early-stage implementation items including banking, business review and plan documents, claims paying processes, education and communication planning, information technology, and integration with other vendors that currently serve the Plan in another capacity, such as Human Resources Information Systems.

6. On January 12, 2023, BCBSNC submitted a bid protest letter to the Plan, challenging the Award to Aetna and requesting a bid protest meeting.

7. On January 20, 2023, The Plan's Interim Executive Administrator, Samuel Watts, sent BCBSNC written notice denying its request for a protest meeting and explaining why a protest meeting would serve no purpose.

8. On February 16, 2023, BCBSNC filed a Petition for Contested Case Hearing in the Office of Administrative Hearings in Durham County, North Carolina challenging the Award to Aetna. BCBSNC alleges in its Petition that the Plan awarded the contract pursuant to arbitrary criteria, failed to gather and consider critical information, and used a distorted scoring system. Due to these alleged flaws, BCBSNC claims that the RFP process that led to the Award constituted

improper procedure; the Award to Aetna was erroneous, arbitrary, and capricious; and BCBSNC was substantially prejudiced as a result. (Petition at 1.) Accordingly, BCBSNC asks this Tribunal: (1) to order that the TPA Contract be awarded to BCBSNC, and (2) in the alternative, vacate the Award to Aetna and order the Plan to conduct a new RFP process. (*Id.* at 25.)

9. Aetna now timely files this Motion to Intervene as a Respondent-Intervenor with all the rights of the party to defend the Award and protect its interest in the TPA Contract.

10. BCBSNC does not object, and the Plan consents to Aetna's intervention.

II. ARGUMENT

A. Aetna is Entitled to Intervene under N.C. Gen. Stat. § 150B-23(d) and Rule 24(a)(2)

11. Section 150B-23(d) of the North Carolina General Statutes provides that “any person interested in a contested case may intervene and participate in that proceeding to the extent deemed appropriate by the administrative law judge.” 26 N.C.A.C. 03 .0117 provides that an administrative law judge may allow an intervenor to: “(1) File a brief without acquiring the status of a party; (2) Intervene as a party with all the rights of a party; or (3) Intervene as a party with all the rights of a party but limited to specific issues and to the means necessary to present and develop those issues.” As the awardee of the TPA Contract, Aetna is a person interested in the contested case and should be allowed to intervene as a party with full rights.

12. Section 150B-23(d) of the North Carolina General Statutes further provides that “any person may petition to become a party by filing a motion to intervene in a manner provided in G.S. 1A-1, Rule 24.” Upon timely application, “Rule 24 provides for intervention both as of right and through court permission.” *In re Se. Eye Ctr.-Pending Matters*, No. 15 CVS 1648, 2020 WL 4783552, at *2 (N.C. Super. Ct. Aug. 17, 2020).

13. A movant is entitled to intervene as of right under Rule 24(a) when (1) a statute . . . confers an unconditional right to intervene or (2) when it “claims an interest relating to the property or transaction which is the subject of the action and . . . disposition of the action may as a practical matter impair or impede . . . [its] ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.” N.C. R. Civ. P. 24(a); *see also Holly Ridge Assocs., LLC v. N.C. Dep’t of Env’t & Nat. Res.*, 361 N.C. 531, 537, 648 S.E.2d 830, 835 (2007). Intervention as of right under Rule 24(a)(2) is appropriate if the movant’s interest is “of such direct and immediate character that [it] will either gain or lose by the direct operation and effect of the judgment.” *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 128, 388 S.E.2d 538, 554 (1990) (quoting *Strickland v. Hughes*, 273 N.C. 481, 485, 160 S.E.2d 313, 316 (1968)).

14. Aetna is entitled to intervene as of right under Rule 24(a)(2) because it has a direct, pecuniary interest in the subject of this action as the awardee of the contract that BCBSNC seeks to nullify, at a minimum, and at best, claim for itself. Because the Award to Aetna may be overturned, Aetna has a direct and immediate interest sufficient to support intervention. *See N.C. Monroe Const. Co. v. Guilford Cty. Bd. of Ed.*, 278 N.C. 633, 640, 180 S.E.2d 818, 822 (1971) (holding successful bidder for a construction contract with the Guilford County Board of Education was “a necessary party in a proceeding to declare its contract with the defendant invalid and the court below could not properly determine the validity of that contract without making [the successful bidder] a party to the proceeding.”); *see also Mgmt. Sols. & Sys., Inc. v. United States*, 75 Fed. Cl. 820, 826–27 (Fed. Cl. 2007) (proposed intervenor had an interest in the challenged property because intervenor had been awarded the contract at issue, and “[i]f the relief requested

[by petitioner] is granted, [intervenor's] work . . . will cease, causing monetary loss and the termination of employees").¹

15. Aetna is also situated such that the disposition of these proceedings may impair or impede its ability to protect its interest in the TPA Contract unless it is permitted to intervene because disposition of this action in BCBSNC's favor could render Aetna's contract void.

16. Finally, no party to this action adequately represents Aetna's interests. BCBSNC's interests are directly adverse to Aetna's. While Aetna and the Plan may support a similar outcome at this juncture, the Plan is charged with representing the interests of the State and the Plan's members, not those of private contractors such as Aetna. *See Letendre v. Currituck Cnty.*, 261 N.C. App. 537, 817 S.E.2d 920 (2018), *writ denied, temporary stay dissolved*, 372 N.C. 59, 822 S.E.2d 638 (2019) (holding Currituck County did not have the same interests as the private landowners seeking intervention because Currituck County's "sole litigation interests are to protect the 'public welfare' and the interests of its 'general citizenry' ").

17. Therefore, while Aetna's and the Plan's interests overlap, those interests are not identical and may diverge because the Plan may choose to litigate matters or take positions that are different from or even in conflict with Aetna's. *See, e.g., Mgmt. Sols. & Sys., Inc.*, 75 Fed. Cl. at 827 ("The Government could, at any point in the proceedings, take a position or action that conflicts with [intervenor's] interests. Moreover, [intervenor] may be able to provide relevant information that the Government does not possess."); *see also, e.g., In re Sierra Club*, 945 F.2d

¹ The North Carolina Court of Appeals "has long held that federal decisions interpreting federal rules are persuasive authority when interpreting similar state rules." *Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC*, 250 N.C. App. 791, 797–98 (2016); *see also Alford v. Davis*, 131 N.C. App. 214, 218, 505 S.E.2d 917, 920 (1998) ("This Court recently stated in *United Services [Auto. Assoc. v. Simpson]*, 126 N.C. App. 393, 485 S.E.2d 337, *disc. review denied*, 347 N.C. 141, 492 S.E.2d 37 (1997)] that the current approach to interpreting G.S. § 1A–1, Rule 24 is found in the Fourth Circuit Court of Appeals decision of *Teague v. Bakker*, 931 F.2d 259 (4th Cir. 1991).").

776, 779-80 (4th Cir. 1991) (finding intervention proper where the state should “in theory[] represent all of the citizens of the state,” including proponents of the action the Sierra Club sought to oppose, while the Sierra Club would represent “only a subset of citizens” with specific interests); *see also Bailey & Assocs., Inc. v. Wilmington Bd. of Adjustment*, 202 N.C. App. 177, 188, 89 S.E.2d 576, 585 (2010) (“[T]he City could not adequately represent Intervenor’s interests before the trial court since their interest is ‘of such direct and immediate character that [Intervenor] will gain or lose by direct operation of the judgment[.]’”); *Letendre*, 2018 WL 4440587, at *4 (Observing that “Currituck County could make a financial decision not to proceed with litigation and agree to a settlement with plaintiff Letendre which would not protect the . . . [intervenors’] interests.”).

18. The “inadequate representation” requirement “is satisfied if the applicant shows that representation of his interest ‘may be’ inadequate; and the burden of making that showing should be treated as minimal.” *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). Aetna has satisfied this minimal burden and is entitled to intervene as a matter of right under Rule 24(a)(2). *See United Guar. Residential Ins. Co. of Iowa v. Philadelphia Sav. Fund Soc.*, 819 F.2d 473, 475 (4th Cir. 1987) (“[W]hen a party to an existing suit is obligated to serve two distinct interests, which although related, are not identical, another with one of those interests should be entitled to intervene.” (citing *Trbovich*, 404 U.S. at 538)).

B. In the Alternative, Aetna Should be Permitted to Intervene

19. At a minimum, Aetna should be permitted to intervene. “Permissive intervention under Rule 24(b)[(2)] is appropriate ‘[w]hen an applicant’s claim or defense and the main action have a question of law or fact in common[.]’ ” *In re Se. Eye Ctr.-Pending Matters*, 2020 WL 4783552, at *2 (quoting *Hinton v. Hinton*, 250 N.C. App. 340, 346, 792 S.E.2d 202, 206 (2016)). “Rule 24(b)(2) does not require a permissive intervenor to show ‘a direct personal or pecuniary

interest in the subject of the litigation.’ ” *Koenig v. Town of Kure Beach*, 178 N.C. App. 500, 507, 631 S.E.2d 884, 889 (2006) (quoting *In re Baby Boy Searce*, 81 N.C. App. 531, 541, 345 S.E.2d 404, 410 (1986)).

20. BCBSNC alleges that the Plan’s process for evaluating the proposals submitted in response to the RFP was flawed because: (1) the Plan failed to score each vendor’s network and therefore did not take into consideration that BCBSNC allegedly had significantly more providers than Aetna has in North Carolina, (Petition at ¶¶ 45–52); (2) the Plan failed to validate the offerors’ self-reported network pricing and would have awarded BCBSNC more points than Aetna for network pricing if it had, (*id.* at ¶¶ 53–59); (3) the weights and scoring methods employed by the Plan for assessing administrative fees and network-pricing guarantees lacked rational basis, (*id.* at 60–73); (4) the technical requirements should not have been given equal weight, several of the technical requirements were impossible or not in the best interest of the Plan’s members, and it was error for the Plan to refuse to consider explanations if an offeror could not meet a technical requirement, (*id.* at 74–107); and (5) the Plan’s ranking system was unsound, arbitrary, and capricious because it had no rational basis, (*id.* at 108–114).

21. If allowed to intervene, Aetna intends to defend the Award in part by arguing that BCBSNC has waived its right to contest the RFP process and its requirements by failing to raise its objections prior to submitting its proposal during the question-and-answer period provided for in the RFP, at which point the Plan could have considered BCBSNC’s arguments and amended the RFP if persuaded. Additionally, Aetna will offer evidence rebutting the erroneous factual allegations asserted by BCBSNC concerning the size and scope of Aetna’s network, the accuracy of Aetna’s self-reported network pricing, and the feasibility of the technical requirements in the

RFP. Based on this and other evidence developed during the contested case, Aetna will ask the administrative law judge to uphold the Plan's decision to award the TPA Contract to Aetna.

22. Therefore, intervention by Aetna will not "unduly delay or prejudice the adjudication of rights"; to the contrary, Aetna's contribution will augment the record before the Tribunal to assist with a more complete and efficient analysis of BCBSNC's claims.

C. Aetna's Motion to Intervene is Timely

23. Finally, Aetna's motion to intervene is timely. "As a general rule, motions to intervene made prior to trial are seldom denied" on timeliness grounds. *State Employees' Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 264 (1985); *see also Hoke Cnty. Bd. of Educ. v. State*, No. 425A21-2, 2022 WL 3575964, at *6 (N.C. Aug. 19, 2022) (same). The question of whether an application to intervene is timely is left to the discretion of the Tribunal, which should consider the following factors: "(1) the status of the case, (2) the possibility of unfairness or prejudice to the existing parties, (3) the reason for the delay in moving for intervention, (4) the resulting prejudice to the applicant if the motion is denied, and (5) any unusual circumstances." *Procter v. City of Raleigh, Bd. of Adjustment*, 133 N.C. App. 181, 183, 514 S.E.2d 745, 746 (1999) (quoting *State Employees' Credit Union, Inc.*, 75 N.C. App. at 264, 330 S.E.2d at 648).

24. Granting this Motion to Intervene would not result in any delay in the contested case and would not unfairly prejudice any existing party as this action was only recently filed, and Aetna is moving to intervene at the first opportunity to do so. Moreover, as of the time of the filing of this Motion, the Tribunal has made no ruling on the merits. There is no possibility of "delay" of the proceeding and no resulting prejudice to any party if Aetna is permitted to intervene because intervention will facilitate judicial economy by consolidating consideration of interests that could be impacted by the outcome of this action.

25. Therefore, this motion is timely. *See Holly Ridge Assocs., LLC*, 361 N.C. at 537 (affirming timeliness of motion to intervene filed two months after the close of discovery and one month before a contested case hearing); *see also Taylor v. Abernethy*, 149 N.C. App. 263, 267, 560 S.E.2d 233, 236 (2002) (holding that a motion to intervene filed after the plaintiff had presented all its evidence at trial was timely); *Hamilton v. Freeman*, 147 N.C. App. 195, 202, 554 S.E.2d 856, 860 (2001) (affirming timeliness of motion to intervene filed prior to any hearing on the merits and prior to the entry of final judgment).

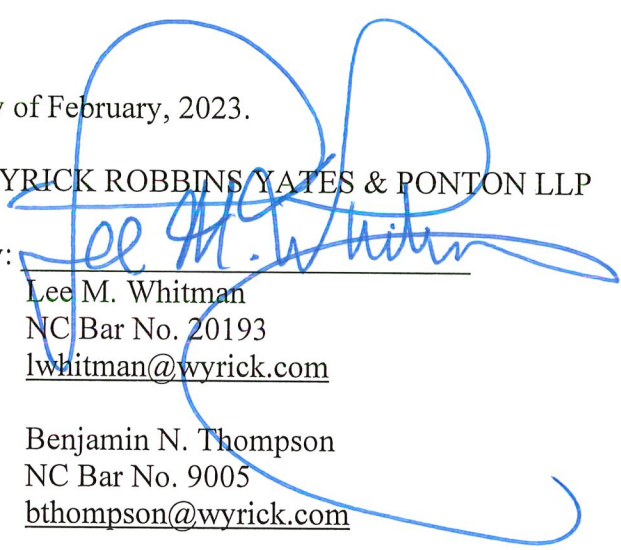
III. CONCLUSION

26. Based on the foregoing, Aetna respectfully requests that an Order be entered Granting the Motion to Intervene and allowing Aetna to intervene as a Respondent-Intervenor with all of the rights of a party to participate fully and for all purposes in all aspects of the proceedings. A proposed order is attached hereto.

Respectfully submitted, this the 23rd day of February, 2023.

WYRICK ROBBINS YATES & PONTON LLP

By:


Lee M. Whitman
NC Bar No. 20193
lwhitman@wyrick.com

Benjamin N. Thompson
NC Bar No. 9005
bthompson@wyrick.com

Sophia V. Blair
NC Bar No. 53753
sblair@wyrick.com

4101 Lake Boone Trail, Suite 300
Raleigh, North Carolina 27607
(919) 781-4000

*Attorneys for Defendant-Intervenor Aetna Life
Insurance Company*

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing MOTION TO INTERVENE BY AETNA LIFE INSURANCE COMPANY on the following via electronic transmission:

Matthew W. Sawchak
N.C. State Bar No. 17059
msawchak@robinsonbradshaw.com
434 Fayetteville Street, Suite 1600
Raleigh, North Carolina 27601

Stephen D. Feldman
N.C. State Bar No. 34940
sfeldman@robinsonbradshaw.com
434 Fayetteville Street, Suite 1600
Raleigh, North Carolina 27601

Nathan C. Chase, Jr.
N.C. State Bar No. 39314
nchase@robinsonbradshaw.com
101 N. Tryon Street, Suite 1900
Charlotte, North Carolina 28246

Counsel for Blue Cross and Blue Shield of North Carolina

Via certified mail, return receipt requested:

J. Benjamin Garner, Esq., designated agent for service of process
North Carolina State Health Plan for Teachers and State Employees
3200 Atlantic Avenue
Raleigh, NC 27604

This, the 23rd day of February, 2023.

By: 

Lee M. Whitman

Attorney for Aetna Life Insurance Company