

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

NEW MEXICO HEALTH CONNECTIONS,
a New Mexico Non-Profit Corporation,

Plaintiff,

v.

No. 1:16-cv-00878-JB/JHR

UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES, CENTERS FOR
MEDICARE AND MEDICAID SERVICES;
THOMAS E. PRICE, Secretary of the United States
Department of Health and Human Services, in his
official capacity, and SEEMA VERMA, Acting
Administrator for the Centers for Medicare and
Medicaid Services, in her official capacity,

Defendants.

NOTICE OF SUPPLEMENTAL AUTHORITY

Pursuant to Local Rules 7.8(b) and 7.8(c), Plaintiff New Mexico Health Connections, Inc. respectfully notifies the Court of a recent decision holding that HHS acted arbitrarily and capriciously in violation of the Administrative Procedures Act (“APA”) by failing to “seriously respond” to public comments regarding a proposed rule pertaining to the Affordable Care Act (“ACA”). *See Am. Coll. of Emergency Physicians v. Price*, 2017 U.S. Dist. LEXIS 140314, No. 16-913 (D.D.C. Aug. 31, 2017). Just like *Price*, this case involves, *inter alia*, APA claims challenging HHS’ failure to meaningfully respond to public comments regarding rules issued pursuant to the ACA. *See* Memorandum of Law in Support of New Mexico Health Connections’ Motion for Summary Judgment [Doc. 33], at 27-28, 36-37, 39-41, 44; Plaintiff’s Reply and Opposition to Defendants’ Cross-Motion for Summary Judgment (Dkt. No. 40), at 3-5, 17-20.

In *Price*, plaintiff challenged the issuance of a rule requiring insurers to pay physicians the greatest of three listed amounts for emergency medical services. *Id.* at *5-*6. Commenters had expressed concerns regarding the accuracy of one of the rates and suggested an alternative approach. *Id.* at *6-*7. In its final rule, HHS responded that these concerns were “addressed by our requirement that the amount be the greatest of the three amounts”. *Id.* at *8. The Court held that this response was arbitrary and capricious as it failed to “seriously respond to the actual concerns raised about the particular rates, and it ignore[d] altogether the proposed alternative of using a database to set payment.” *Id.* at *11. “At a minimum,” an agency’s response must enable the court to see what major issues of policy were ventilated and why the agency reacted to them as it did. *Id.* at *16. HHS’ response “all but ignored [public] comments and proposals.” *Id.* at *11. While the subject matter of the case was “complex, the Court’s obligation under the [APA] is simple.” *Id.* at *2. The court remanded to the agency for further response to comments and explanation of the rule.

Dated: September 18, 2017

Respectfully submitted:

/s/ Nancy R. Long

Nancy R. Long
 LONG, KOMER & ASSOCIATES, PA
 2200 Brothers Road/PO Box 5098
 Santa Fe, NM 87502
 (505) 982-8405
 nancy@longkomer.com
 email@longkomer.com
 vmarco@longkomer.com

Barak A. Bassman
 Sara B. Richman
 Leah Greenberg Katz
 PEPPER HAMILTON LLP
 3000 Two Logan Square
 Eighteenth and Arch Streets
 Philadelphia, PA 19103-2799

215-981-4000
bassmanb@pepperlaw.com
richmans@pepperlaw.com
katzl@pepperlaw.com

Marc D. Machlin
PEPPER HAMILTON LLP
Hamilton Square
600 Fourteenth Street, N.W.
Washington, D.C. 20005-2004
202-220-1200
machlinm@pepperlaw.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2017, I electronically filed the foregoing Notice of Supplemental Authority using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

/s/ Nancy R. Long

Nancy R. Long