Petitioners UnitedHealthcare of Pennsylvania, Inc. d/b/a UnitedHealthcare Community Plan ("United") and HealthAmerica Pennsylvania, Inc. d/b/a CoventryCares ("Coventry"), hereby submit this brief in support of their petition for review in these consolidated matters.[1] For the reasons set forth below, United and Coventry each submit that this Court should reverse the September 17, 2012 Final Determination of the Office of Open Records as to its determination respecting Paragraphs 3 and 4 of the Right-to-Know Request in issue (which are referenced as Items 1 and 2 in the Final Determination), and further order that no further action must be taken by the Pennsylvania Department of Public Welfare with respect to this matter.

I. STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter as a petition for review within its appellate jurisdiction, pursuant to 42 Pa.C.S. §763, and as a matter arising under the Right-to-Know Law, pursuant to 65 P.S. §67.1301.

II. DETERMINATION IN QUESTION

The determination in question is the Final Determination of the Office of Open Records issued on September 17, 2012, at OOR Docket No. 2011-1098, as to its determination respecting Paragraphs 3 and 4 of the Right-to-Know Request in issue (which are referenced as Items 1 and 2 in the Final Determination). The Final Determination concludes:

> For the foregoing reasons, Requester's appeal is granted in part and denied in part and the Department is required to disclose all records sought in Items 1 and 2 of the Request....

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[1] Pursuant to Pennsylvania Rule of Appellate Procedure 2137, United and Coventry also adopt by reference the matters contained within the briefs filed by the other petitioners (at 1935 & 1949 CD 2012) in these consolidated cases.

(OOR at 19.) The Final Determination is unreported. A copy of the Final Determination is attached hereto as ***Exhibit A***.

III. STATEMENT OF THE STANDARD AND SCOPE OF REVIEW

The standard and scope of review applicable in Right-to-Know Law proceedings reflect that this Court owes absolutely no deference to the determination by the Office of Open Records. United and Coventry submit that, given the multitude of errors committed by the OOR, this Court should supplant the OOR's decision and rule in United's and Coventry's favor.

Indeed, this Court has held that its standard of review under the RTKL is *de novo*. This Court is not bound by any of the findings of the OOR, and instead will independently review the OOR's order and substitute its own findings for that of the agency. See Scott v. Delaware Valley Reg'l Planning Comm'n, 56 A.3d 40, 43 n.3 (Pa. Commw. 2012) (citing Bowling v. Office of Open Records, 990 A.2d 813, 818 (Pa. Commw. 2010), appeal granted, 15 A.3d 427 (Pa. 2011)). *De novo* review under the RTKL "entails full consideration of a case another time; the court is 'substituted for ... the prior decision maker, and redecide[s] the case.'" Chester Cmty. Charter Sch. v. Hardy, 38 A.3d 1079, 1085 (Pa. Commw. 2012) (citation omitted). This "court conducts its own review without having to give deference to the OOR's appeals officer." Id.

Similar to its standard of review, this Court's scope of review is plenary. See Allegheny County Dep't. of Admin. Svcs. v. Parsons, ___ A.3d ___, 2013 WL 141697, *4 (Pa. Commw. Jan. 14, 2013).

IV. STATEMENT OF THE QUESTIONS INVOLVED

1. Should this Court reverse the Office of Open Records for failing to hold that the requested records are exempt from disclosure under the "confidential proprietary

information" exemption of the Right-to-Know Law, where the OOR ignored testimony conclusively supporting application of this exemption, and refused to separately apply the exemption, in violation of the plain language of the RTKL and this Court's Bari decision?

(Answered in the negative by the OOR; suggested answer: Yes.)

2. Should this Court reverse the OOR for failing to hold that the requested records are exempt from disclosure under the "trade secret" exemption of the RTKL, where the OOR failed to consider the "potential" economic value of the rates, as required by the statute, and mischaracterized the testimony presented, which, when properly considered, conclusively supports application of this exemption?

(Answered in the negative by the OOR; suggested answer: Yes.)

3. Should this Court reverse the OOR for following the Lukes decision, given this Court has repeatedly declared it is no longer good law as arising under the prior version of the RTKL, and because the OOR used that decision to nullify the "confidential proprietary information" exemption of the current RTKL?

(Answered in the negative by the OOR; suggested answer: Yes.)

4. Should this Court reverse the OOR for refusing to separately consider application of the Pennsylvania Uniform Trade Secrets Act, thus flouting the RTKL provision exempting from disclosure records "exempt from being disclosed under any other Federal or State law"?

(Answered in the negative by the OOR; suggested answer: Yes.)

V. STATEMENT OF THE CASE

A. Introduction

In this case, James Eiseman, Jr., a lawyer associated with the Public Interest Law Center of Philadelphia ("PILCOP"), is attempting to obtain, pursuant to the Right-to-Know Law,

65 P.S. §§67.101 to 67.3104 ("RTKL"), records reflecting the negotiated dental rates paid both to, and by, managed care organizations ("MCOs") that enrolled recipients of the Department of Public Welfare's "HealthChoices" program in five counties in Southeastern Pennsylvania for the period January 1, 2008 to June 15, 2011. (R. 1a-4a.) At the hearing in this matter (the first of its kind in the history of the Office of Open Records), United, Coventry, the other MCOs participating in this case, and DPW each proffered overwhelming testimony conclusively showing that the records sought by PILCOP are clearly protected from disclosure under each of the "trade secret" and "confidential proprietary information" exemptions of the RTKL, see 65 P.S. §67.708(b)(11), as well as the Pennsylvania Uniform Trade Secrets Act. PILCOP made no serious attempt to refute this overwhelming testimony at the hearing. PILCOP did not even call a witness of its own. Instead, PILCOP tried to use its cross-examinations of the MCO and DPW witnesses as a fishing expedition to try to obtain collateral information having nothing to do with the secret and confidential nature of the rates.[2] Nevertheless, OOR held in its Final Determination that the records were not exempt. That decision is replete with flaws and should be reversed by this Court, conducting *de novo* review under the RTKL.

B. The HealthChoices program

Administered by the Department of Public Welfare, HealthChoices is the Commonwealth's managed care Medical Assistance (also known as Medicaid) program. Enrollees in that program receive quality medical care and timely access to health services through an MCO of their choosing. The MCOs compete with one another to offer a superior product in order to obtain the highest number of enrollees. (R. 206a.)

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[2] Given PILCOP's improper lines of questioning, the MCOs and DPW were forced to lodge repeated objections that the Hearing Officer repeatedly sustained on at least twenty (20) separate occasions. (See generally R. 172a-672a) (hearing transcript).

DPW administers the program by entering into agreements with each MCO. (R. 209a-210a.) Each such contract includes confidentiality provisions requiring the parties to keep confidential any proprietary information that is exchanged between them as a result of the parties' relationship. The agreement specifically provides that each MCO

> considers its *financial* reports *and information*, marketing plans, *Provider rates*, *trade secrets*, *information* or materials relating to the []MCO's software, databases or technology, and information or materials licensed from, or *otherwise subject to contractual nondisclosure rights of third parties*, *which would be harmful to the []MCO's competitive position to be confidential information.* This information shall not be disclosed by the Department to other parties except as required by law . . . .

(R. 843a-844a) (emphasis added). Included among such confidential information are the terms of payment between DPW and each MCO, which are known as "capitation rates." (R. 224a-225a.) These rates are a headcount-based rate; in other words, the MCOs are paid on a per-member basis. (R. 211a-213a.)

The MCOs, in turn, enter into contractual arrangements with dental subcontractors. (R. 374a-375a, 492a.) The MCOs, like DPW, also pay their subcontractors based on capitation rates. (R. 493a.) Payment terms as between any given MCO and dental subcontractor will vary and are periodically renegotiated, at significant time and expense. (R. 375a.) United subcontracts with an entity called Dental Benefit Providers ("DBP"), and Coventry subcontracts with a company called DentaQuest. (R. 375a, 492a.) The subcontracts uniformly require the protection of confidential information and trade secrets, and in the course of dealing between the MCOs and their subcontractors, the parties routinely protect such information. (R. 493a.) Pursuant to those subcontracts and otherwise, the MCOs and their

dental subcontractors treat the payment and rate information that pertains to their relationship as highly confidential.[3] (Id.)

Both sets of capitation rates (the DPW-MCO rates, and the MCO-subcontractor rates) are not readily available outside – or even inside – the MCOs. External reporting is limited to situations where such is required by law or by government directive; internal disclosure is limited to a business need to know. (R. 378a.) In this way, the MCOs can protect their competitive position, which is essential to meaningful choice for prospective enrollees.

C. PILCOP's request, DPW's response, and PILCOP's appeal

On June 17, 2011, PILCOP, through Mr. Eiseman, submitted an open records request to DPW pursuant to the RTKL. (R. 1a-4a.) In its request, PILCOP seeks, in pertinent part, records reflecting the dental rates that DPW pays to the five MCOs providing dental coverage to HealthChoices recipients in the Southeast Zone (comprised of Philadelphia, Montgomery, Bucks, Delaware and Chester Counties) for the period January 1, 2008 to June 15, 2011. (R. 3a, at ¶3.) PILCOP also seeks such documents reflecting the dental rates that the MCOs in turn pay out for dental services. (R. 3a, at ¶4.)

DPW responded to PILCOP's request with a lengthy nine-page response dated July 25, 2011, wherein DPW provided PILCOP with extensive information concerning the HealthChoices program. (R. 7a-15a.) Therein, DPW partially granted and partially denied PILCOP's request. (Id.) In relevant part, DPW denied PILCOP's request to the extent that it

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[3] For their part, the dental subcontractors have contracts with the dental providers, and the subcontractors negotiate separate payment terms with individual dental practices. PILCOP does not seek in the request here any records reflecting rates paid by the subcontractors to the providers. Only the rates paid by DPW to the MCOs, and the MCOs to the subcontractors, are in issue here.

sought records reflecting the rates in issue, as the rates are trade secrets and confidential proprietary information. (Id.)

PILCOP appealed DPW's determination on August 15, 2011. (R. 16a-28a.) Shortly thereafter, both United and Coventry each timely submitted notice to the Office of Open Records requesting to participate in the proceedings, pursuant to 65 P.S. §67.1101(c), as well as their opposition to disclosure of the requested records. (R. 31a-34a, R. 57a-59a.) PILCOP did and does not object to the participation of either United or Coventry, or to that of the other MCOs – Aetna, Keystone Mercy, and HealthPartners.

D. The Hearing

Upon request, the OOR decided to hold a hearing in this matter, which ultimately took place on May 21 and 22, 2012. (R. 148a.) The OOR's Appeals Officer who ultimately authored the Final Determination, Charles Rees Brown, Esquire, did not sit as the Hearing Officer. Rather, the OOR hired an outside attorney, Edward S. Finkelstein, Esquire, to sit as Hearing Officer. (R. 73a-74a.) Mr. Finkelstein did not enter any findings, however, and therefore did not make any credibility assessments. The sole determination entered below was the Final Determination of Mr. Brown, who did not – and could not – offer any credibility determinations.

At the hearing, each of United and Coventry presented a knowledgeable executive as a witness. United presented Heather Cianfrocco, who is the President of United. (R. 336a-416a.) Coventry presented Nancy Sirolli-Hardy, who serves as Vice-President of Operations for CoventryCares. (R. 485a-512a.) In addition, United and Coventry presented (along with the other MCOs) the testimony of Dr. Henry Miller, a recognized expert in the field. (R. 280a-322a, R.673a-679a.) Each of these witnesses provided unequivocal testimony under oath that the rates sought by PILCOP are trade secrets and confidential proprietary information. (R. 290a-297a,

377a-383a, 489a-496a.) That testimony did not waver upon cross-examination. (R. 301a, 308a, 391a, 412a-413a, 497a-500a, 509a-510a.) Similarly, the witnesses put forward by DPW and the other MCOs also uniformly testified to the secret and confidential nature of the rate information that PILCOP sought. PILCOP failed to make any headway in countering these points. Following the hearing, the parties submitted competing briefing. (R. 1028a-1194a.)

E. The OOR's Final Determination and the MCOs' and DPW's petitions for review

On September 17, 2012, the OOR issued its Final Determination. (***Exhibit A***; R. 1204a-1222a.) As previously noted, that decision was authored by the OOR's Appeals Officer, not the Hearing Officer, who actually observed the testimony. The author of the Final Determination therefore was in no better position than this Court in evaluating the testimony.

Despite a two-day hearing at which eight different witnesses were called, as well as a record spanning more than 1,200 pages, the OOR, in its decision, spent just a few pages discussing the testimony (and, as discussed below, mischaracterized it). (OOR at 5-11.) This is surprising, in no small part because, apparently, this was the first case under the new RTKL where a hearing was held during an OOR appeal. Similarly, in spite of the fact that this matter involves several fact-driven legal issues, including analysis of two independent RTKL exemptions, the decision below entails minimal legal analysis. (OOR at 13-18.) Yet in spite of its brevity, that legal analysis still contains several errors, discussed in detail below, that can and should be corrected by this Court.[4]

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[4] In fact, the OOR's decision does not even accurately reflect the nature of the requests themselves. For example, the decision below expands the scope of Paragraph 4 of the request (which is Referenced as Item 2 in the OOR's decision), to rates paid by the MCOs to "medical service providers." (OOR at 16.) This is troubling given the unchallenged testimony of United and Coventry that they do not pay the providers directly, but rather pay the subcontractors, who

United, Coventry, the other MCOs, and DPW each timely filed petitions for review from the OOR's decision on October 17, 2012.[5] These parties also intervened in one another's actions. Upon unopposed application, the matters were consolidated before this Court on December 19, 2012. This brief is now timely filed pursuant to the Court's orders pertaining to briefing of this matter.[6]

VI. SUMMARY OF ARGUMENT

This Court, which owes no deference at all to the Office of Open Records, should reverse the decision below. The records requested by PILCOP are exempt from disclosure under each of the "trade secret or confidential proprietary information" exemptions of the Right-to-Know Law. See 65 P.S. §67.708(b)(11) (emphasis added). Those records also are exempt from disclosure under the Pennsylvania Uniform Trade Secrets Act. The records reflect capitation rates that are held in the strictest confidence. The contracts the MCOs have with DPW and their subcontractors expressly require confidential treatment of those rates, and DPW and the MCOs undertake efforts and maintain practices in order to protect the confidentiality of the rates. Those rates are at least of "potential" economic value, and if disclosed, they would be of value to competitor MCOs and subcontractors, who would use that information to visit substantial competitive harm upon the affected MCO. United, Coventry, the other MCOs, and DPW

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in turn pay the providers. It thus appears that the OOR may not have fully grasped the nature of the rates in issue here.

[5] The petition of United and Coventry is docketed at 1950 CD 2012. The petition of Aetna, Keystone Mercy, and HealthPartners is docketed at 1949 CD 2012. The petition of DPW is docketed at 1935 CD 2012.

[6] Pursuant to Pennsylvania Rules of Appellate Procedure 2117(c) and 2119(e), United and Coventry (and the other MCOs and DPW) have preserved the issues raised on appeal by participating and objecting to disclosure throughout the OOR proceedings below and in filing a petition for review with this Court.

presented credible testimony expressing all of these points. PILCOP neither undermined that testimony on cross-examination, nor rebutted it with any testimony of its own.

Yet the OOR, mischaracterizing the testimony, held that the MCOs and DPW did not meet their burden to show the records are exempt. The OOR also deemed this Court's prior Lukes decision controlling and as precluding application of the exemptions, notwithstanding that this Court has refused to follow it as arising under the prior version of the RTKL, and despite the fact that the "confidential proprietary information" exemption, a creature of the new RTKL, did not even exist when Lukes was decided. The OOR also refused even to consider the Pennsylvania Uniform Trade Secrets Act, even though the RTKL requires records to be exempted whenever required by "any other Federal or State law."

The records sought are exempt under the RTKL and, therefore, this Court should not require the Department of Public Welfare to take any further action on PILCOP's request.

VII. ARGUMENT

A. Applicable provisions of the Right-to-Know Law

Recently enacted effective January 1, 2009, the Right-to-Know Law, 65 P.S. §§67.101 to 67.3104, provides the rules of the road for access to records held by a Pennsylvania government agency. Importantly, the General Assembly recognized in enacting the RTKL that certain types of records should not be made public, as the RTKL sets forth a host of thirty exemptions to disclosure. See id., §67.708.

Two exemptions squarely apply here. They exempt from access a record that "constitutes or reveals" either a "trade secret ***or*** confidential proprietary information." 65 P.S. §67.708(b)(11) (emphasis added). Due to the disjunctive "***or***" in the statute, the "trade secret" and "confidential proprietary information" exemptions must be separately applied. Thus, a record is exempt from disclosure even if it qualifies under just one of these two exemptions, as

this Court has recognized. See Office of Governor v. Bari, 20 A.3d 634, 647-48 (Pa. Commw. 2011) ("Importantly, 'confidential proprietary information' and 'trade secret' are defined separately under Section 102 of the RTKL; therefore, *the terms are not interchangeable*." (emphasis added; footnote omitted)).[7]

If a record satisfies the elements of either (or both) of these exemptions, then it is not a "public record" under the RTKL and is, therefore, exempt from disclosure. See 65 P.S. §67.101 (defining "public record" to exclude any record exempt under §708); 65 P.S. §67.301 (stating that Commonwealth agencies, such as DPW, need only make "public records" available).

1. The "trade secret" RTKL exemption and the Pennsylvania Uniform Trade Secrets Act.

The RTKL defines the term "trade secret" as:

> Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that
>
> (1) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
>
> (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

65 P.S. §67.102. Thus, a "trade secret" is information that (a) actually or potentially "derives independent economic value" from "not being readily known" to those who might benefit from knowing it, and (b) is the subject of "reasonable" "efforts" to maintain its secrecy.

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[7] As discussed in further detail below, the OOR defied this Court's directive in Bari (even though the MCOs brought that decision to OOR's attention) by refusing to separately and independently apply the "confidential proprietary information" exemption. (OOR at 18 n.9.)

Related to the "trade secret" exemption, the RTKL also captures within its scope the Pennsylvania Uniform Trade Secrets Act, 12 Pa.C.S. §§5301–5308 ("PUTSA"), as the RTKL exempts from disclosure records "exempt from being disclosed under any other Federal or State law" within the definition of "public record" set forth in 65 P.S. §67.102. Pennsylvania courts, in considering whether material is protected under PUTSA, consider a six-factor test:

> (1) the extent to which the information is known outside the business;
>
> (2) the extent to which the information is known inside the business;
>
> (3) the measures taken to limit internal and external disclosure;
>
> (4) the information's value to the secret holder and its competitors;
>
> (5) the effort expended developing the information; and
>
> (6) the ease with which the information can be duplicated by outsiders.

See Bimbo Bakeries USA, Inc. v. Botticella, 613 F.3d 102, 109 (3d Cir. 2010) (stating factors). PUTSA furnishes a separate and independent basis for exempting the records from disclosure.[8]

2. The "confidential proprietary information" RTKL exemption

Even if a record is not protected either by the "trade secret" exemption, or under PUTSA, it nevertheless may be exempt from disclosure if it qualifies under the "confidential

[8] As discussed below, in spite of the fact that the "public record" definition excludes from disclosure any record "exempt from being disclosed under any other Federal or State law," and hence on its face captures laws like PUTSA, the OOR expressly refused to consider application of PUTSA. (OOR at 13) ("OOR will only consider whether responsive records are exempt from disclosure under 65 P.S. §67.708(b)(11)").

proprietary information" exemption. The RTKL separately defines "confidential proprietary information" as:

> Commercial or financial information received by an agency:
>
> (1) which is privileged or confidential; and
>
> (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information.

65 P.S. §67.102. Thus, "confidential proprietary information" is "commercial or financial" information (a) that is "privileged or confidential" and (b) the disclosure of which would cause substantial harm to the "competitive position" of the party.

B. Records reflecting HealthChoices rates are exempt under the RTKL.

As noted previously, at the hearing in this matter, United and Coventry put forward the testimony of two high-ranking company executives: Heather Cianfrocco, President of United, and Nancy Sirolli-Hardy, Vice-President of Operations for CoventryCares. Each provided unequivocal and unrebutted testimony that the rates in question are covered by each of the "trade secret" and "confidential proprietary information" exemptions as well as PUTSA. Moreover, their testimony was supported by that of Dr. Henry Miller, a recognized expert in the field.

Each of the United and Coventry witnesses testified that she has personal job responsibilities relating to the HealthChoices program. (R. 367a, 486a.) The witnesses explained that the MCOs are compensated under their HealthChoices contract with DPW on a per enrollee, per month basis, also known as a "capitation" rate basis. (R. 370a, 489a.) There is no separate dental rate; the capitation rate is a combined rate for physical and dental services. (R. 372a, 490a.)

Each of United and Coventry subcontract certain HealthChoices services they are required to provide pursuant to their DPW contract, including but not limited to dental services. (R. 374a-375a, 492a-493a.) Under their subcontracts, each of United and Coventry also pay their subcontractors on a capitation rate basis. (R. 375a, 492a.) The MCOs' subcontractors, in turn, negotiate rates with individual dental provider practices to furnish services to enrollees. (R. 376a-377a, 494a.)

Given that the MCOs are compensated by DPW on a per person basis, the more enrollees that each MCO is able to attract, the more revenue it can generate for itself. (R. 372a, 490a.) Indeed, the enrollees in the HealthChoices program have the choice of enrolling with the MCO of their choosing. (R. 368a, 369a, 487a.) The MCOs, therefore, compete with one another for enrollees, and hence for revenue. (R. 372a, 487a, 490a.) Moreover, there is no guarantee that the MCOs will be continually included in the HealthChoices program from year to year. (R. 372a.)

Each of the MCOs separately negotiates its capitation rates with DPW. (R. 374a, 487a.) Those rates are not static; they change from year to year. (R. 373a, 489a, 490a.) United and Coventry each expend significant time and effort negotiating their rates with DPW. (R. 373a-374a, 491a, 492a.)

The contract between DPW and each MCO provides that the capitation rates are required to be subjected to confidential treatment. (R. 370a-371a, 377a-378a, 489a, 490a.) Indeed, the agreement provides that each MCO

> considers its *financial* reports *and information*, marketing plans, *Provider rates*, *trade secrets*, *information* or materials relating to the []MCO's software, databases or technology, and information or materials licensed from, or *otherwise subject to contractual nondisclosure rights of third parties, which would be harmful to the []MCO's competitive position to be confidential information.*

> This information shall not be disclosed by the Department to other parties except as required by law . . . .

(R. 843a-844a) (emphasis added). The United and Coventry witnesses testified that they understood the contract's confidentiality provisions as covering the capitation rate information. (R. 371a, 490a.)

This testimony dovetailed with that of the DPW witness, who testified DPW accords confidential treatment to the rates it pays to the MCOs. (R. 247a) ("Q. . . . Does DPW treat the capitation rate information that's in each contract between DPW and each MCO as confidential? A. Yes. . . . Q. Do you share one MCO's capitation rates with any other MCO? A. Never."). Consistent with the contract between DPW and the MCOs, as well as DPW's need to protect and preserve taxpayer funds, DPW prevents disclosure of the rates it pays to the MCOs – a matter even the OOR was forced to concede. (OOR at 6, 7.) Indeed, the DPW witness testified forcefully about the need to protect taxpayer dollars by maintaining the confidentiality of the rates it pays the MCOs:

> We spend about $6 billion per year on HealthChoices Program and another $3 billion on the Behavioral HealthChoices Program, we're expanding HealthChoices, and that expansion will increase the amount we're paying from one and a half billion dollars. It is important for the Department to effectively manage the program, which means ensuring the recipients the access to the services that they're entitled to, but also to minimize the cost of the program to the taxpayer. We take that last part very seriously. We try hard to not pay more for this program than we absolutely have to. We work hard with the actuaries from the development of the rate ranges. When we negotiate the terms, we try to negotiate the minimum necessary terms, because part of our process or our endeavor is to keep the rates as low as possible to find that we need to negotiate different terms with the different MCOs. *It is important to the Department to keep those various terms confidential so as to avoid other MCOs asking for additional revenue. We believe that if the terms were available to everyone, all the MCOs in their contracts, they would come to us seeking additional revenue.* And like I said, keeping the cost of the program as small as possible while being an extremely extensive

program, but avoiding unnecessary costs is very important to DPW.

(R. 225a-226a) (emphasis added).

DPW policy, and the DPW witness' testimony, are consistent with federal regulations requiring DPW to conduct all procurement processes for the purchasing of services with federal dollars (which is the case for HealthChoices, as a Medical Assistance/Medicaid program) in a manner designed to foster healthy and fair competition among potential government contractors. See 45 C.F.R. §74.43; 42 C.F.R. §434.70(a)(2)&(b) (providing that state governments failing to comply with federal conditions forfeit federal funding). Federal regulations presume the confidentiality of documents relating to the expenditure of federal funds where the disclosure of such documents would substantially harm the competitive position of the party submitting the information. See 45 C.F.R. §§.65(B)(4)(ii), §74.53(f). Pennsylvania regulations similarly accord confidential treatment to records like those reflecting the rates in issue.[9] See 28 Pa. Code §9.604(a)(8).

With respect to United's and Coventry's separate contracts with their dental subcontractors, those contracts also require that the capitation rates be kept confidential. (R. 375a, 493a.)

In addition to the requirements of the contracts with DPW, on the one hand, and the dental subcontractors, on the other hand, United and Coventry also each take internal steps and spend time and resources to maintain the confidentiality of the capitation rates. (R. 378a-

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[9] None of these federal and state regulations, or the important policy interests embodied in them and in DPW's policies, are referenced in the OOR's decision in this case, in spite of having been raised by DPW and the MCOs. Those regulations also point to the fact that the records in issue here, if disclosed, could threaten the Commonwealth with a loss of federal funding. See 65 P.S. §67.708(b)(1)(i).

379a, 380a-381a, 494a-495a.) For example, rate information is transmitted to the MCOs in a secure format. (R. 378a.) The information also is internally reviewed and accessed only by those individuals employed by the MCO who have a need to access the rates. (R. 378a, 494a-495a.) The electronic rate information is stored in a restricted-access database, and hard copies are kept under lock and key. (R. 378a, 379a, 494a.) The information is not shared externally – and "never" is given to another MCO. (R. 378a-379a, 495a.)

The MCOs would maintain the "highly confidential" capitation rates as such even if the contract with DPW did not require confidential treatment. (R. 379a-380a, 415a-416a, 511a.) Such is the case because disclosure of rate information would damage United's and Coventry's businesses. (R. 381a, 496a.) For example, were a competitor to obtain an MCO's capitation rates, it could use that information to negotiate a better deal with DPW, causing a loss of market share to the MCO. (R. 382a-383a, 496a.) As a consequence, each of the MCOs is very careful not to disclose any confidential rate information to any of the other MCOs.[10] (R. 380a.)

The testimony of the United and Coventry witnesses was supported by that of Dr. Henry Miller, an expert in the field of managed health care contract negotiations. (R. 673a-679a.) Dr. Miller testified unequivocally that capitation rates, including rates paid to subcontractors, are trade secrets and are confidential proprietary information. (R. 290a, R.

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[10] PILCOP's cross-examination of the United and Coventry witnesses only reinforced the MCOs' position. PILCOP elicited testimony that the MCOs treat the rate information as "extremely proprietary" and that they maintain it as such because it could be used to "inappropriately underbid" the MCO. (R. 390a-395a, 402a-406a.) PILCOP also elicited unequivocal testimony that the rate information is both a trade secret and confidential proprietary information. (R. 412a.) PILCOP further solicited testimony that the MCOs compete for market share, and that they would lose market share if their competitors learned of their rates. (R. 413a, R. 499a, 509a-510a.)

293a.) He testified that the MCOs "absolutely" consider their rate information to be proprietary and confidential. (R. 297a.) Dr. Miller explained that the MCOs undertake great efforts to maintain the rate information as confidential. (R. 290a.) He explained, for example, that the MCOs limit the number of individuals within each organization who can access the rates. (R. 291a-292a.) Moreover, he explained, security efforts and controls are put in place to limit the ability of a person to gain access to rate information. (R. 291a.) Dr. Miller expressed that he has never seen an instance where capitation rate information was publicly released by an MCO. (R. 294a.) Indeed, in his experience, it is very difficult for anyone outside the organization to obtain that information. (R. 297a.) Dr. Miller further explained that a breach of confidentiality as to the capitation rates would lead to competitive harm. (R. 294a-295a.) He testified that, in his experience, the MCOs "absolutely" believe that they would sustain harm to their competitive positions if the rate information were to be disclosed. (R. 297a.)

Based on the foregoing, United and Coventry clearly supplied more than ample testimony in satisfaction of both of the "trade secret" and "confidential proprietary" exemptions, such that records reflecting the capitation rate information are not subject to disclosure under the RTKL. Yet virtually none of this testimony was ever discussed by the OOR in its decision.[11]

[11] In light of the OOR's multiple failures to appropriately consider the testimony in this matter, this Court ultimately may determine the matter should be remanded for further consideration by the OOR upon instructions by this Court. See, e.g., Gaming Control Bd. v. Office of Open Records, 48 A.3d 503, 513-14 (Pa. Commw. 2012) (remanding to OOR to assess trade secret and confidentiality claims).

1. The "confidential proprietary information" exemption applies.

Records reflecting the HealthChoices rates at issue here are exempt under the RTKL "confidential proprietary information" exemption. As noted previously, under the RTKL, "confidential proprietary information" is "commercial or financial" information

(a) that is "privileged or confidential" and

(b) where disclosure would cause substantial harm to the "competitive position" of the party.

65 P.S. §67.102.

United and Coventry each provided extensive testimony respecting the "confidential" nature and treatment of the rate information: the information is accorded such treatment in the contracts with DPW and the MCOs' subcontractors; access to that information is limited to a "need to know" basis; security measures are in place to protect the rates; and internal and external disclosure is prevented. (R. 370a-371a, 378a, 489a-490a, 843a-844a, 375a, 493a, 378a-379a, 380a-381a, 494a-495a, 290a-292a, 294a, 297a.)

Each of United and Coventry also provided testimony showing the substantial competitive harm they would sustain if the rates were disclosed, such as where another MCO or subcontractor could use that rate information to obtain more financially advantageous arrangements to the detriment of the MCO whose information was disclosed. (R. 381a, 496a, 382a-383a, 294a-295a, 297a.)

This testimony went completely unrebutted by PILCOP at the hearing. United and Coventry, therefore, made a sufficient showing such that the "confidential proprietary information" exemption of the RTKL applies here.

This case is analogous to this Court's decision in Giurintano v. Department of General Services, 20 A.3d 613 (Pa. Commw. 2001). There, this Court held that the "confidential

proprietary information" RTKL exemption applied to preclude disclosure. Id. at 615-17. The records in question were connected with a government contractor's provision of telephone translation services to DGS. Id. at 614. The contractor sought to invoke the "confidential proprietary information" exemption to defeat disclosure, and submitted an affidavit supporting invocation of that exemption. Id. at 616-17. This Court was satisfied the affidavit established that the contractor kept the information confidential to protect its investment and assets, and that disclosing that information would cause substantial competitive harm to the contractor within its industry. Id. As such, the Court held the exemption applied. Id. at 617.

Here, the OOR gave virtually no consideration to the "confidential proprietary information" exemption, devoting just a single paragraph in its decision to that exemption. (OOR at 17-18 & n.9.) In fact, the OOR essentially refused to consider this exemption, as in the OOR's view it would not consider the possibility that the records might *not* be exempt as "trade secrets," but at the same time *could* be exempt as "confidential proprietary information." (OOR at 18 n.9.) By construing the statute this way, the OOR decided the two exemptions were joined at the hip and had to be applied the same way in every case – notwithstanding the "or" in the statute and the separate definitions of the two concepts in the RTKL. In doing so, the OOR defied both the plain language of the statute and also this Court's express directive in its Bari decision (a decision the MCOs specifically brought to OOR's attention) that these two exemptions "are not interchangeable." Office of Governor v. Bari, 20 A.3d 634, 647-48 (Pa. Commw. 2011) ("Importantly, 'confidential proprietary information' and 'trade secret' are defined separately under Section 102 of the RTKL; therefore, *the terms are not interchangeable*." (emphasis added; footnote omitted)). The OOR, by refusing to separately consider the two exemptions, made them "interchangeable." The OOR's conflation of these

independent exemptions must be rejected, as such a reading would render at least one of them superfluous. See, e.g., Allegheny County Dep't of Admin. Svcs. v. A Second Chance, Inc., 13 A.3d 1025, 1037 (Pa. Commw. 2011) (in construing Right-to-Know Law, rejecting application of Law that would render provision "redundant of other provisions of the RTKL and would amount to mere surplusage.").

The OOR's excuse for gutting the "confidential proprietary information" exemption was its determination that it would not construe the RTKL to "deny access to records required to be disclosed under the prior" version of the RTKL. (OOR at 18 n.9.) The OOR, however, failed to provide any support for the notion that the prior version of the RTKL sets some kind of mandatory "floor" for disclosure that has to be laminated onto the new version of the RTKL in every case. Similarly, the OOR expressed an unfounded fear that a finding of exemption under the "confidential proprietary information" exemption would render "meaningless" the decision in Lukes v. Department of Public Welfare, 976 A.2d 609 (Pa. Commw. 2009). But that case was decided under the prior version of the RTKL, which did not contain the "confidential proprietary information" exemption found in the new RTKL.[12] Yet the OOR decided that case should control the decision on this exemption anyway.

Nor did the OOR's cursory analysis remotely approach the analysis this Court conducted in Giurintano. In fact, the OOR completely ignored that decision, in spite of the MCOs' reference to it in their post-hearing brief. Instead, the OOR, right after acknowledging that the MCOs presented "extensive testimony" about the steps they take to preserve confidentiality, and after acknowledging competitors might be able to make more favorable

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[12] The OOR's reliance on Lukes is troublesome for additional reasons discussed below in connection with the "trade secret" exemption.

arrangements if they knew another MCO's rates, simply declared that the evidence "does not establish" the MCOs would suffer "substantial harm" if their "provider rates"[13] were disclosed. But the OOR never explained how or why that was the case. The testimony was diametrically the opposite of the OOR's conclusion, as the testimony presented by United and Coventry, referenced above, unequivocally established that they would suffer substantial harm as a result of disclosure.[14]

In sum, the OOR's decision as to the "confidential proprietary information" RTKL exemption is wholly unsupportable. It must be reversed.

2. The "trade secret" exemption and Pennsylvania Uniform Trade Secrets Act apply.

Wholly separate and independent of the "confidential proprietary information" exemption, the records requested may be exempt under the RTKL if the "trade secret" exemption applies. Under the RTKL, a "trade secret" is information that

(a) actually or potentially "derives independent economic value" from "not being readily known" to those who might benefit from knowing it, and

(b) is the subject of "reasonable" "efforts" to maintain its secrecy.

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[13] Once again, the OOR's reference to "provider rates" was in error. As the testimony at the hearing universally established, the MCOs do not have "provider rates." They pay a capitation rate to the subcontractors. The subcontractors, in turn, pay the providers, typically based on a fee schedule.

[14] In addition to these many flaws, the OOR's decision was not even consistent with its own prior decisions, none of which were referenced in its decision. See, e.g., Dahlgren v. Dep't of General Svcs., OOR Dkt. AP 2009-0631, pp. 8-9 (Sept. 10, 2009) (OOR held records exempt under "trade secret or confidential proprietary information" exemptions where records involved pricing quoted by pharmaceutical company to DGS); Zeshonski v. Dep't of Health, OOR Dkt. AP 2011-0698, p. 10 (July 20, 2011) (OOR held fees and pricing information "are confidential proprietary information that is properly protected by" the "trade secret or confidential proprietary information" exemptions).

65 P.S. §67.102.

Each of United and Coventry provided testimony that the capitation rate information is of economic value to each of them, and would be of economic value to a competitor or subcontractor, who could derive economic value from that information by negotiating more advantageous terms for itself, to the detriment of United and Coventry. (R. 381a, 496a, 382a-383a, 294a-295a, 297a.) If disclosed, the rates would supply competitors with solid parameters by which they could refine their own pricing strategies in an effort to unfairly win business. Certainly this testimony supports at least "potential" economic value, which is the minimum showing required under this RTKL exemption.

Each of United and Coventry also provided testimony that they undertake reasonable efforts to maintain the secrecy of the rate information, including by providing for confidentiality in their contracts with DPW and the subcontractors, providing for "need to know" access to the information whereby only certain members of their organizations can access the information, providing for electronic and hard copy security, and otherwise preventing internal or external disclosure. (R. 370a-371a, 377a-378a, 489a, 490a, 843a-844a, 375a, 493a, 378a-379a, 380a-381a, 494a-495a, 290a-291a, 291a-292a, 294a, 297a.)

As was the case with the "confidential proprietary information" exemption, the above testimony concerning the "trade secret" exemption also went unrebutted by PILCOP at the hearing. United and Coventry, therefore, made a sufficient showing such that the "trade secret" exemption of the RTKL applies here.

Despite the foregoing, the OOR neither applied the individual elements of the "trade secret" definition, nor did it consider any of the foregoing testimony. It simply decided that the MCOs could not show any economic value in the rates, specifically those paid by DPW

to the MCOs, because the rates for a given year are based on factors "*completely independent* of the capitation rate previously paid by the Department." (OOR at 14) (emphasis added). This bold statement is made without reference to supporting testimony. Nor could it be, because the testimony was at odds with this declaration. For example, Ms. Cianfrocco, the United witness, specifically testified that "past utilization" was one factor that was considered in the rate negotiations with DPW. (R. 403a.) She further testified that learning United's prior years' rates would be of benefit to a competitor in negotiating its own rates with DPW. (R. 404a.) The OOR's "completely independent" conclusion simply is without support in the testimony from the hearing.[15]

In addition to its unsupported "completely independent" conclusion, the OOR also "cherry-picked" testimony that was adverse to the MCOs. For example, the OOR claimed Ms. Cianfrocco testified, unequivocally, that learning a competitor's rate would be of "no value to United in negotiating its own capitation rates." (OOR at 10) (citing R. 390a). However, on the very next page of Ms. Cianfrocco's testimony in the hearing transcript, she testified that potentially having another MCO's rates might help United "inappropriately underbid them." (R. 391a.) She further testified, in response to a question from the Hearing Officer, that another MCO's rates would "be valuable if I chose to either change my services or agree to accept lower rates from the Department." (Id.) Thus, contrary to the OOR's selective presentation of the

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[15] Moreover, immediately following its unsupported "completely independent" discussion, the OOR invoked, *sua sponte*, the "financial records" language contained in 65 P.S. §67.708(c). PILCOP did not raise the "financial records" language in this matter. Moreover, even had PILCOP appropriately raised that provision, it only could apply to the rates DPW pays to the MCOs, as that provision pertains only to "the receipt or disbursement of funds *by an agency*." 65 P.S. §67.708(c). Further, the "financial records" language obviously cannot have any impact on PUTSA's exemption of the records from disclosure, given PUTSA stands outside the confines of the RTKL.

testimony, the United witness actually *did* testify that knowing a competitor's rates could provide a competitive advantage to United. Moreover, this testimony, at a minimum, supports application of the "potential" economic value language of the "trade secret" definition, a matter addressed nowhere in the OOR's decision.[16]

In addition to failing to fully consider the testimony supporting the "trade secret" exemption, the OOR specifically refused to consider the Pennsylvania Uniform Trade Secrets Act, 12 Pa.C.S. §§5301–5308 ("PUTSA"). (OOR at 13.) Thus, the OOR negated that portion of the "public record" definition exempting from disclosure records "exempt from being disclosed under any other Federal or State law." 65 P.S. §67.102. That decision is particularly troubling because this Court has indicated a willingness to separately consider the PUTSA in RTKL cases, as the statute requires. See, e.g., Gaming Control Bd. v. Office of Open Records, 48 A.3d 503, 513 & n.23 (Pa. Commw. 2012) (indicating PUTSA contention would have been evaluated had it been properly preserved and argued in RTKL matter). Had the OOR done so, it would have found that PUTSA applies to preclude disclosure under the RTKL, as all six elements under that law are present here, based on the testimony described above:

(1) the rates are only known to a very limited extent outside of the business;

(2) the rates are only known to a very limited extent inside the business;

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[16] Perhaps the OOR's presentation of the testimony might be explained by the fact that it did not appear to understand that Ms. Cianfrocco was expressing that the degree of competitive advantage that United might reap by learning of a competitor's rates would depend on what those rates actually were and how they might compare with United's rates. (R. 392a.) The "trade secret" definition accounts for this necessary lack of knowledge by including within its scope "potential" economic value. Certainly Ms. Cianfrocco's testimony is sufficient to establish "potential" economic value. But again, the OOR gave no consideration to the word "potential" in the statute, in spite of it having been argued by United and Coventry in their brief.

(3) the companies take measures to limit internal and external disclosure;

(4) the rates are valuable both to the companies and their competitors;

(5) the companies expend significant effort developing the rates; and

(6) the rates could not be duplicated easily by outsiders.

See Bimbo Bakeries USA, Inc. v. Botticella, 613 F.3d 102, 109 (3d Cir. 2010) (stating factors). The OOR therefore should have found PUTSA exempted the records in issue from disclosure.

It appears that the OOR gave short shrift to the facts and law submitted by DPW and the MCOs concerning the "trade secret" and PUTSA exemptions because it thought it was bound by the decision in Lukes v. Department Public Welfare, 976 A.2d 609 (Pa. Commw. 2009). (OOR at 16-17.) OOR should not have followed that decision. Lukes, a decision authored by former Senior Judge James R. Kelley, is no longer good law. That case was decided under the prior version of the Right-to-Know Law, not the current version at issue here. At least two subsequent decisions by this Court have refused to follow Lukes for this very reason. See, e.g., In re: Silberstein, 11 A.3d 629, 632 n.8 (Pa. Commw. 2011) ("However, our decision in Lukes was rendered pursuant to the former version of the RTKL, which as noted herein, was repealed by the current RTKL. Therefore, our decision in Lukes is not controlling in this matter."); Office of the Budget v. OOR, 11 A.3d 618, 622 (Pa. Commw. 2011) (same). While the OOR attempted to prop up Lukes' validity by claiming the Supreme Court "approved" of Lukes in SWB Yankees LLC v. Wintermantel, 45 A.3d 1029 (Pa. 2012), the Court did nothing of the sort. The Court made just two passing references to Lukes in two footnotes. The first reference was in connection with the Court's recitation of the lower court's decision, wherein the lower court discussed Lukes in connection with the prior version of the RTKL. Id. at 1035 n.8.

In the second reference, the Yankees Court merely noted that Lukes was "consistent" with its decision. Id. at 1044 n.19. These fleeting references hardly can be considered "approval" of Lukes. That decision is not good law, should not have been followed by the OOR, and obviously need not be followed by the Court here.

Yet even if one were to put aside the fact that Lukes is no longer valid, it should not be followed anyway. As previously noted, Lukes arose under the prior version of the RTKL and thus can shed no light on the question of whether the records in issue are exempt as reflecting "confidential proprietary information." Indeed, the Lukes court only considered whether the records qualified as trade secrets under the Trade Secrets Act. See Office of Governor v. Bari, 20 A.3d 634, 647-48 (Pa. Commw. 2011) (distinguishing prior case as based on question of whether trade secret status applied, "not whether the requested information constituted 'confidential proprietary information'" under RTKL). The OOR therefore should not have applied Lukes to defeat all exemptions; consequently, this Court should reverse the OOR for doing so.

VII. CONCLUSION

For the foregoing reasons, Petitioners UnitedHealthcare of Pennsylvania, Inc. d/b/a UnitedHealthcare Community Plan and HealthAmerica Pennsylvania, Inc. d/b/a CoventryCares respectfully request that this Court reverse the September 17, 2012 Final Determination of the Office of Open Records as to its determination respecting Paragraphs 3 and 4 of the Right-to-Know Request in issue (which are referenced as Items 1 and 2 in the Final Determination), and further order that no further action must be taken by the Pennsylvania Department of Public Welfare with respect to this matter.

Respectfully submitted,

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Dated: March 25, 2013

CERTIFICATE OF SERVICE

I, Karl S. Myers, hereby certify that on March 25, 2013, I caused the foregoing to be filed with the Court, and served the same via US Mail, postage prepaid, upon the following:

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